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No. 07-

IN THE

Supreme Court of the United States

DIRECTV, INC.,
Petitioner,
v.
HOA HUYNH,
Respondent.

DIRECTV, INC.,
Petitioner,
v.
CODY OLIVER,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Federal Communications Act makes it illegal for "[a]ny person" to "modif[y] . . . any . . . device or equipment, knowing or having reason to know that the device or equipment is primarily of assistance in the unauthorized decryption of satellite cable programming, or direct-to-home satellite services . . . ." 47 U.S.C. § 605(e)(4). Respondents modified legitimate devices in order to transform them into devices primarily of assistance in stealing satellite programming and used those devices to view DIRECTV's programming without paying for it. The questions presented are:

1. Did the Court of Appeals err in concluding, in conflict with four circuits, that § 605(e)(4) does not make it illegal to take a legitimate device — such as an access card or receiver — and modify it into a piracy device that can be used to decrypt satellite transmissions?

2. Did the Court of Appeals err in concluding, in conflict with two circuits, that § 605(e)(4) does not apply to "[a]ny person" who modifies a piracy device for personal use, but only to "bigger fish" who do so for commercial purposes?

PARTIES TO THE PROCEEDING BELOW AND RULE 29.6 STATEMENT

The caption on this petition lists all parties to the proceeding before the Court of Appeals.

Petitioner DIRECTV, Inc. ("DIRECTV"), a California corporation, is a wholly owned subsidiary of DIRECTV Enterprises, LLC, a Delaware limited liability company. DIRECTV Enterprises, LLC, is a wholly owned subsidiary of DIRECTV Holdings, LLC, a Delaware limited liability company. DIRECTV Holdings, LLC, is a wholly owned subsidiary of The DIRECTV Group, Inc., a publicly owned Delaware corporation. Liberty Media Corporation holds approximately 41% of the stock of The DIRECTV Group, Inc. The shares of The DIRECTV Group, Inc. and Liberty Media Corporation are publicly traded.

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OPINIONS BELOW

The opinions of the United States District Court for the Northern District of California in *DIRECTV, Inc.* v. *Huynh*, No. 04-3496 CRB (N.D. Cal. decided May 31, 2005), and *DIRECTV, Inc.* v. *Oliver*, No. 04-3454 SBA (N.D. Cal. decided May 12, 2005), are unpublished and are reproduced in the Appendix to this Petition (App.) at 17a-55a. These two cases were consolidated for review before the United States Court of Appeals for the Ninth Circuit. The Court of Appeals' majority opinion and dissent, dated September 11, 2007, are reported at *DIRECTV, Inc.* v. *Huynh*, 503 F.3d 847 (9th Cir. 2007), and are reproduced at App. 1a-16a. The order of the Court of Appeals denying Petitioner's petition for rehearing en banc is unpublished, and is reproduced at App. 56a-57a.

JURISDICTION

The Court of Appeals entered an opinion on September 11, 2007, upholding the dismissal of Petitioner's claims based on violations of 47 U.S.C. § 605(e)(4). A timely petition for rehearing en banc was denied on January 3, 2008. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISION

This case involves the construction of 47 U.S.C. § 605(e)(4), which provides:

> "Any person who manufactures, assembles, modifies, imports, exports, sells, or distributes any electronic, mechanical, or other device or equipment, knowing or having reason to know that the device or equipment is primarily of

> assistance in the unauthorized decryption of satellite cable programming, or direct-to-home satellite services, or is intended for any other activity prohibited by subsection (a) of this section, shall be fined not more than $500,000 for each violation, or imprisoned for not more than 5 years for each violation, or both."

The full text of 47 U.S.C. § 605 is reproduced in the Appendix, beginning at App. 58a.

INTRODUCTION

Since the inception of the satellite broadcast industry, individuals attempting to steal television programming without paying for it — conduct that Congress has labeled "piracy" — have threatened the industry's very survival. These modern day satellite "pirates" are not swashbucklers with peg legs and eye patches, but they are dangerous nevertheless. Satellite pirates are far more numerous than the Blackbeards and Calico Jacks that menaced the seas long ago, and they have stolen wealth — billions of dollars in value — beyond the imagination of the greediest pirate of yore. Although satellite pirates do not roam the high seas — they prefer stealing their hefty bounties from the comfort of their own homes — they have threatened to kill an entire industry.

That is no exaggeration. For as long as there has been satellite broadcasting, there has been satellite piracy. In the 1980s, half of all satellite receivers had been modified for piracy. *See* H.R. No. Rep. 100-887 (II) at 14, 1988 U.S.C.C.A.N. 5577, 5642. At times, the satellite industry has lost more than four billion dollars of revenue a year to piracy. *See, e.g.*, David Lieberman, *Feds enlist hacker to foil piracy ring*, USA Today, Jan. 10, 2003 at 1B. A congressional commit-

tee surveying the carnage in 1988 observed that this new breed of "piracy ... seriously threatens to undermine the survival" of the entire "satellite industry." H.R. Rep. No. 100-887 (II) at 14, 1988 U.S.C.C.A.N. 5577, 5642.

Congress intervened "to give both prosecutors and civil plaintiffs the legal tools they need to bring piracy under control." *Id.* at 5658. Congress achieved this end by amending the Federal Communications Act to prohibit certain acts of piracy. Congress imposed some penalties on people who simply use pirated devices. *See* 47 U.S.C. § 605(a) and § 605(e)(3)(C)(i)(II). But Congress imposed more substantial penalties on "[a]ny person who manufactures, assembles, [or] modifies ... any ... device or equipment, knowing or having reason to know that the device or equipment is primarily of assistance in the unauthorized decryption of satellite cable programming, or direct-to-home satellite services ...." 47 U.S.C. § 605(e)(4) and § 605(e)(3)(C)(i)(II).

Section 605(e)(4), in particular, has played a central role in the efforts of the satellite broadcast industry and federal law enforcement officials to combat piracy. DIRECTV, alone, has filed some 25,000 civil lawsuits based on § 605 and assisted federal law enforcement officials in criminal prosecutions for violations of § 605. These legal actions were intended to create the deterrence that Congress and DIRECTV believe is necessary to ensure the continued viability of the satellite broadcast industry.

At issue in this case is whether the satellite broadcast industry and law enforcement must cede some of the terrain back to the satellite pirates. The Ninth Circuit has limited the scope of § 605(e)(4) in two critical ways — both creating clear and irreconcilable

conflicts with several other circuits. First, the Court of Appeals held that this provision makes it illegal to modify a device that is *already* a piracy device, but not to take a legitimate device and turn it into a piracy device. The Fifth, Sixth, Eighth, and Tenth Circuits all disagree. Second, the Ninth Circuit held that § 605(e)(4) applies only to commercial actors and excludes those who modify devices for their own use. The Fourth and Fifth Circuits disagree.

In so ruling, the Court of Appeals has fragmented the national enforcement regime Congress strove to enact. Everywhere else in the country a satellite pirate who engages in certain acts of piracy is subject to criminal prosecution and hefty civil penalties. Not so for a satellite pirate who engages in the same acts in the Ninth Circuit, which has established itself as the new Barbary Coast for electronic piracy.

STATEMENT

Respondents Huynh and Oliver are two of 25,000 individuals DIRECTV has sued for stealing its programming. Their acts of piracy followed a common pattern.

In order to watch DIRECTV's programming, a customer must have a satellite dish, a receiver, and an access card, which plugs into the receiver. App. 3a. The satellite dish receives DIRECTV's transmission from a satellite, the access card identifies for the receiver the programming that the customer has paid to receive, and then the receiver decrypts that portion of the transmission and converts it into a viewable television program. *Id.*

Because the access card dictates which programs the customer is entitled to receive, it is the natural, and most common, target of satellite pirates. Using a

reprogrammed access card, viewers have decrypted all of DIRECTV's programming without authorization from or payment to DIRECTV. App. 3a. The satellite broadcaster's enemy number one, then, is not so much the consumer who uses a reprogrammed access card, but the satellite pirate who has figured out how to reprogram an access card in the first place.

To combat piracy, DIRECTV developed electronic counter measures, or "ECMs." Transmitted from DIRECTV's satellites, the ECM signal disables reprogrammed access cards by sending the cards' software into a "loop" that prevents the cards from functioning. App. 3a. The more sophisticated satellite pirates parried those efforts. They developed a device called an "unlooper" that restores functionality to illicitly modified DIRECTV access cards that have been disabled by DIRECTV's ECMs. App. 3a-4a. In general, unloopers are configured for only one purpose — stealing DIRECTV's satellite signal. App. 4a.

In this case, DIRECTV filed separate complaints against Huynh and Oliver alleging that they had violated 47 U.S.C. § 605(e)(4) by reprogramming DIRECTV access cards and using an unlooper to restore functionality to the cards once the cards were disabled by DIRECTV's ECMs. App. 23a-27a, 39a, 43a-44a. As is common in these cases, both Respondents failed to appear in their respective cases before the district court.[1]

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[1] Respondents also failed to appear before the Court of Appeals. The decisions of the district court were defended in briefing and at oral argument by *amicus curiae*, the Electronic Frontier Foundation.

In both cases, the district court granted DIRECTV default judgment on certain of its claims, but refused to find that Respondents had violated § 605(e)(4). In *Oliver*, the district court held that the defendant's conduct of modifying a DIRECTV access card did not violate § 605(e)(4), because "Plaintiff has not alleged that Defendant was involved in the sale or distribution of the Pirate Access Devices. . . ." App. 47a. In *Huynh*, the district court held that Congress intended for § 605 to "treat differently different participants in the market for piracy products" and as a result § 605(e)(4) applies only to commercial manufacturers or distributors of pirate access devices, not to individuals who assemble or modify the devices for personal use. App. 37a-38a.

A divided panel of the Court of Appeals affirmed the district court judgments, with Judges Fletcher and Hawkins in the majority and Senior Judge Siler, sitting by designation from the Sixth Circuit, in dissent. The Court of Appeals gave two separate grounds for its ruling.

First, the Court of Appeals held that Respondents' alleged conduct — using unloopers to reprogram DIRECTV access cards — did not constitute modification in violation of § 605(e)(4). App. 11a-12a. In the Court of Appeals' view, § 605(e)(4) prohibits only modification of a device that is "primarily of assistance" in piracy in the first place — i.e., *before* the device is modified. App. 11a-12a. As a result, the Court of Appeals concluded that the modification of DIRECTV access cards, which are legitimate devices before they are reprogrammed, does not violate § 605(e)(4). App. 12a.

Second, the Court of Appeals held that DIRECTV could not maintain a cause of action against Huynh or Oliver for violating § 605(e)(4) because the provision "does not apply to individual end-users." App. 13a. In this regard, the Court of Appeals agreed with the district court that "subsection (e)(4) aims at bigger fish — the assemblers, manufacturers, and distributors of piracy devices." App. 13a.

Judge Siler dissented. He believed that "the district courts erred in determining that 47 U.S.C. § 605(e)(4) does not apply to individual use." App. 15a. According to Judge Siler, "[t]he language of the statute is clear" and forbids conduct by "any person" who engages in one of the seven acts listed in the disjunctive in § 605(e)(4). App. 15a-16a. Judge Siler further noted that the Court of Appeals' decision is in conflict with decisions from the United States Courts of Appeals for the Fourth and Fifth Circuits, and that he believed that the Fourth and Fifth Circuits had correctly decided the issue. App. 16a.

The Court of Appeals denied a petition for rehearing en banc. App. 56a-57a.

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari because (I) the Court of Appeals' holdings create two distinct and irreconcilable conflicts with decisions from other circuits; (II) the correct interpretation of the statute is a matter of national importance, especially in light of the need for a uniform national enforcement regime to combat satellite piracy; and (III) the Court of Appeals' holdings are wrong.

I. THE COURT OF APPEALS HAS CREATED TWO CONFLICTS WITH DECISIONS FROM FIVE OTHER COURTS OF APPEALS.

In approaching this case, the Court of Appeals confronted a harmonious body of appellate opinions that displayed neither confusion nor disagreement about the scope of 47 U.S.C. § 605(e)(4). In issuing its opinion, the Court of Appeals created a distinct circuit conflict on each of its two holdings.

A. The Federal Appellate Courts Are Divided on the Issue of Whether the Modification of Legitimate Devices Constitutes a Violation of § 605(e)(4).

The first conflict is over what acts constitute a violation of § 605(e)(4). Specifically, when Respondents both took an access card and reprogrammed it to turn it into a piracy device, did they violate this provision? The Court of Appeals framed the issue as follows:

> "Because subsection (e)(4) prohibits only the modification of devices that are 'primarily of assistance in the unauthorized decryption of satellite cable programming,' the question is whether DIRECTV's access cards are such devices 'primarily of assistance in piracy.'" App. 11a.

Focusing only on how DIRECTV's access cards are designed to function, the Court of Appeals concluded that "DIRECTV's access cards, which are anti-piracy devices integral to DIRECTV's subscription process, are not devices 'primarily of assistance in piracy.'" *Id.*. The Court of Appeals explained:

> "DIRECTV's access card is used in every legitimate system to limit a receiver's decryption of programming to that for which the subscriber has paid. While the card's centrality to DIRECTV's efforts to prevent the pirating of satellite transmissions makes the cards targets for pirates' modification, we reject DIRECTV's argument that their access cards are devices 'primarily of assistance in the unauthorized decryption of satellite cable programming.'" App. 12a.

In other words, the Court of Appeals held, it is not an act of piracy, under § 605(e)(4), to take a device with a legitimate purpose and modify it into a piracy device; the provision prohibits only modifying a device that is *already* a piracy device.

This ruling conflicts directly with the decisions of four different circuits — the Fifth, Sixth, Eighth and Tenth Circuits. Each of those circuits have held that § 605(e)(4) prohibits the modification of legitimate devices to transform them into devices that — once modified — are capable of receiving encrypted satellite broadcasts without authorization. Importantly, and in contrast to the approach taken by the Court of Appeals in the instant case, the Fifth, Sixth, Eighth and Tenth Circuits considered the functionality of the device *after* it had been modified.

In *United States* v. *Harrell*, 983 F.2d 36 (5th Cir. 1993), the Fifth Circuit upheld the conviction of a defendant under § 605(e)(4) for having modified satellite receivers. The defendant argued that the receiver could not qualify as a device that was primarily of assistance in piracy. The Fifth Circuit disagreed and discussed at length how modified

descramblers become primarily of assistance in piracy, holding that:

> "The primary purpose of the legal unscrambling of subscribed programs has been permanently changed by the new computer chip which enables unlimited viewing of unpaid signals. * * * The modified modules are rendered incapable of any service because the observed tampered seal would subject the users to the risk of being reported to the proper authorities. * * * Therefore, the modules cannot be serviced, changed, sold or even given away in fear that the user's piracy be found out. The broken seal has delegated the modules to secrecy, unable to reenter the legal mainstream." *Id.* at 38.

As a result, the Fifth Circuit held that the modification of legitimate receivers violates § 605(e)(4). *Id.* at 40.

In *United States* v. *One Macom Video Cipher II*, 985 F.2d 258 (6th Cir. 1993), the Sixth Circuit, too, confronted a situation in which an individual had modified a legitimate receiver to turn it into a piracy device. The Sixth Circuit noted that the modification of legitimate receivers changes the fundamental function of those devices: "The modified descramblers enabled a purchaser to receive premium pay satellite television channels without paying a fee to the programmers." *Id.* at 259. The Sixth Circuit went on to hold that "*§ 605 prohibits the modification of descramblers*"; that § 605 does not "specifically exclude[] the modification of descramblers from its application"; and that the defendant was therefore "subject to criminal prosecution" for violating § 605(e)(4). *Id.* at 261 (emphasis added).

In *United States* v. *Davis*, 978 F.2d 415, 419-20 (8th Cir. 1992), the Eighth Circuit, sitting en banc, faced the same issue and came to the same conclusion as the Fifth and Sixth Circuits. In *Davis*, the defendant had been convicted of modifying receivers in violation of § 605(e)(4). As in *Harrell* and *One Macom Video Cipher II*, the defendant argued that modified receivers do not qualify as "devices primarily useful for surreptitious interception." The Eighth Circuit rejected this argument and upheld the conviction, noting that "[o]nce completed, the modifications made it possible for the device to descramble and decrypt satellite programming without the knowledge of the cable companies." *Id.* As a result, it held that such modification violated both the Electronic Communications Privacy Act, 18 U.S.C. §§ 2510 *et. seq.*, and § 605(e)(4):

> "[t]he government argues that it was not barred from prosecuting defendant's conduct under both 47 U.S.C. § 605(a) & (e)(4) and 18 U.S.C. §§ 2511, 2512. We agree." 978 F.2d at 420.

Finally, in *United States* v. *McNutt*, 908 F.2d 561 (10th Cir. 1990), the Tenth Circuit came to the same conclusion as the Fifth, Sixth and Eighth Circuits and ruled that § 605(e)(4) prohibits the modification of legitimate descramblers to transform them into pirate access devices. The Court specifically found that Congress enacted § 605(e)(4) to protect "operators of satellite television services" from "economic losses from the revenue forgone due to the use of cloned descrambler modules." *Id.* at 564-65 & n.2. As a result, it found that "McNutt therefore could be subject to civil and criminal penalties under § 605." *Id.* at 564.

The Ninth Circuit's opinion in this case is completely and utterly irreconcilable with these decisions by the Fifth, Sixth, Eighth and Tenth Circuits. In all these other circuits, a satellite pirate who takes a legitimate device and modifies it to make it a piracy device is subject to criminal prosecution and stiff civil penalties. In the Ninth Circuit, the same satellite pirate has no criminal exposure, and cannot be sued for that act.

B. The Federal Appellate Courts Are Divided on the Issue of Whether the Prohibitions of § 605(e)(4) Apply Only to Commercial Actors.

The second conflict among the federal circuits is about what sort of actors are subject to § 605(e)(4). The ruling below conflicts with the rulings of two other circuits on this second question.

In the decision below, the Court of Appeals ruled that § 605(e)(4) does not apply to a satellite pirate who modifies a device for his own use:

> "The context of subsection (e)(4) and its penalties indicate that Congress intended that it apply to those who make piracy devices for commercial purposes rather than to end-users who employ piracy devices for individual personal use. The district court properly determined that § 605(e)(4) does not apply to individual end-users." App. 13a.

According to the court below, "section (e)(4) aims at bigger fish — the assemblers, manufacturers, and distributors of piracy devices." *Id.*

The Fifth Circuit, in a unanimous decision written by Judge Higginbotham, has held exactly the opposite: "we hold that § 605(e)(4) prohibits each of the activities listed therein, and provides no

exception for 'individual users.'" *DIRECTV, Inc.* v. *Robson*, 420 F.3d 532, 544 (5th Cir. 2005); *see also United States* v. *Harrell*, 983 F.2d 36, 40 (5th Cir. 1993) (holding that "it is clear that the statute [§ 605(e)(4)] pertains to commercial as well as individual users, including those with their own satellite dishes"). The Fifth Circuit explained:

> "We are persuaded that the district court erred by categorically removing all 'individual users' from the reach of § 605(e)(4). * * * Nothing on the face of § 605(e)(4) suggests such a limitation. Indeed, it provides that *'[a]ny* person' who engages in the prohibited activities is liable. * * *
>
> "In short, we hold that § 605(e)(4) prohibits each of the activities listed therein, and provides no exception for 'individual users.'" *Robson*, 420 F.3d at 543-544 (emphasis in original).

In so holding, the Fifth Circuit specifically disapproved of the district court decision in *DIRECTV, Inc.* v. *Oliver*, which the Ninth Circuit affirmed in this case. The Fifth Circuit noted, with disapproval, that the district court in *Oliver* was among the "number of courts . . . holding that § 605(e)(4) exempts individual users — that is, the provision 'targets upstream manufacturers and distributors, not the ultimate consumer of pirating devices.'" 420 F.3d at 543 & n.45. The Fifth Circuit then stated that "[w]e reject this view." *Id.* at 544.

In *DIRECTV, Inc.* v. *Pernites*, 200 Fed. Appx. 257 (4th Cir. 2006), the Fourth Circuit, in an unpublished opinion, came to the same conclusion as the Fifth Circuit when it vacated the judgment of a district court that had ruled that § 605(e)(4) applies only to

commercial actors.[2] The Fourth Circuit held that "[w]e find the reasoning in *Robson* persuasive and accordingly conclude that § 605(e)(4) does not categorically exempt individual users." 200 Fed. Appx. at 258.

The dissent below recognized that the opinions from the Fourth and Fifth Circuits were in direct conflict with the logic and outcome of the majority. App. 16a. Judge Siler dissented specifically because he agreed with the prior analysis in *Robson* and *Pernites*. *Id.*

The Court of Appeals did not overcome the conflict by contending that the Fifth Circuit merely "refused to categorically exclude individual users from liability under §605(e)(4)." App. 14a n.5. This artificially narrow view of *Robson* bears no relation to what the Fifth Circuit said and did in that case. The district court in *Robson*, like the Court of Appeals here, held that § 605(e)(4) only applies to commercial actors. The Fifth Circuit reversed a district court on this precise point, and explained:

> "We reject this view. Nothing on the face of § 605(e)(4) suggests such a limitation. Indeed, it provides that '*[a]ny person*' who engages in the prohibited activities is liable." *Robson*, 420 F.3d at 543-544 (emphasis in original).

By relying upon the "any person" language in § 605(e)(4), the Fifth Circuit made clear that all

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[2] Citation to the unpublished decision in *Pernites* is appropriate, given that it is the Fourth Circuit's only ruling on the scope of § 605(e)(4) and is being cited in this Petition in order to demonstrate a conflict. *See* 4th Cir. L.R. 32.1 (citation appropriate where party believes decision "has precedential value in relation to a material issue in a case and there is no published opinion that would serve as well").

persons — commercial actors and individual users — are covered by the provision's prohibitions.

Additionally, even under the Court of Appeals' artificially narrow construction of *Robson*, there is still a conflict. The Court of Appeals, in direct conflict with *Robson*, ruled that § 605(e)(4) categorically excludes individual end users when it held that "§ 605(e)(4) does not apply to individual end-users." App. 13a.

* * *

On each of these issues, the conflict among the Courts of Appeals is stark and irreconcilable. No panel of the Ninth Circuit could possibly find a way to hold satellite pirates liable under § 605(e)(4) for similar acts of piracy and no panel of the Ninth Circuit could ever apply any of that provision's prohibitions against end-users. The Ninth Circuit has been given the opportunity to realign itself with the other circuits, and has declined the opportunity. Meanwhile, it is inconceivable that any of the other circuits will come around to the Ninth Circuit's view on either issue. Their holdings are authoritative and explicit. This Court, alone, can resolve the conflict.

II. THIS CASE RAISES ISSUES OF PROFOUND NATIONAL IMPORTANCE.

The current circuit splits have profound public policy consequences. Congress has found that the sorts of activity targeted in these lawsuits "seriously threatens to undermine the survival" of the entire "satellite industry." H.R. Rep. No. 100-887 (II) at 14, 1988 U.S.C.C.A.N. 5577, 5642. Companies invest vast sums to build, launch, and maintain their satellite systems. Rampant piracy deflates the investment — to the tune of up to four billion dollars a

year. *See, e.g.*, David Lieberman, *Feds enlist hacker to foil piracy ring*, USA Today, Jan. 10, 2003 at 1B; *see also* App 25a (district court referencing trade publication estimating DIRECTV's programming revenue losses at one billion dollars per year). DIRECTV, alone, has spent hundreds of millions of dollars per year combating piracy.

As Congress well understood, satellite piracy is a crime that is especially difficult to detect and punish. The act is, by its very nature, "surreptitious" and private. *DIRECTV, Inc.* v. *Minor*, 420 F.3d 546, 550 (5th Cir. 2005). There is no way to trace a pirated signal to its destination. Yet a single satellite pirate using one access device can steal thousands of dollars worth of satellite programming per year.

To address the harms inflicted upon the satellite industry by piracy, Congress amended the Federal Communications Act twice, first in 1984 and a second time in 1988, to criminalize acts of satellite piracy and to provide satellite broadcasters with standing to sue individuals who engage in acts of piracy and to recover damages. In doing so, Congress strove to create a national enforcement regime against piracy and stated its belief that the then existing patchwork of inconsistent, and in some cases non-existent, state laws prohibiting piracy was inadequate to address the danger posed by piracy. In the House Report that accompanied the bill that became the 1984 Cable Act amendments to the Federal Communications Act, the House Committee considering the bill stated that:

> "The Committee recognizes that a number of states have enacted statutes which provide criminal penalties and civil remedies for the theft of cable service and the Committee applauds those efforts. * * * The Committee

> believes that this problem is of such severity that the federal penalties and remedies contained herein must be available in all jurisdictions (and enforceable in state or federal court) as part of the arsenal necessary to combat this threat." H.R. Rep. 98-934 at 85, 1984 U.S.C.C.A.N. 4655, 4721.

In 1988, Congress revisited the problem of piracy and the same House Committee that had addressed the issue earlier found that piracy still presented a significant danger that warranted more robust protections for the satellite broadcast industry. The Committee noted that piracy was extensive, citing testimony to support that "there are approximately 350,000-400,000 pirated [satellite broadcast receivers], compared with about 400,000 untampered [satellite broadcast receivers]." H.R. Rep. No. 100-887 (II) at 14, 1988 U.S.C.C.A.N. 5577, 5642. It also noted that "[t]he problem of piracy is rampant . . . among private home users." *Id.* at 5658.

As a result, the Committee recommended (and Congress agreed) that the Federal Communications Act be amended "to deter piracy practices by (1) stiffening applicable civil and criminal penalties, (2) expanding standing to sue, and (3) making the manufacture, sale, modification, importation, exportation, sale or distribution of devices or equipment with knowledge that its primary purpose is to assist in unauthorized decryption of satellite cable programming expressly actionable as a criminal act." *Id.* at 5658. The Committee concluded that it "believes these changes are essential to preserve the longterm viability of the [satellite television] industry" and that "the Committee wants to give both prosecutors and civil plaintiffs the legal tools they need to bring

piracy under control." *Id.* These imperatives were embodied in § 605(e)(4).

The Court of Appeals' reading of § 605(e)(4), undermines those tools, and, with them, Congress's hope of protecting the satellite broadcast industry. Precisely because satellite piracy is surreptitious, the civil damages available for violations of § 605(e)(4) (which range from $10,000 to $100,000, per device, *see* § 605(e)(3)(C)(i)(II)) are a vital component of DIRECTV's enforcement efforts. By ruling that those statutory penalties may not be imposed upon satellite pirates who modify access cards for their own use, the Ninth Circuit has made it difficult, if not impossible, for DIRECTV's civil enforcement actions to have the deterrent effect envisioned by Congress.

The Ninth Circuit's holding that § 605(e)(4) does not prohibit the modification of legitimate devices to transform them into pirate access devices similarly frustrates Congress's efforts to combat piracy. Since the inception of the satellite industry, piracy has been conducted through the modification of legitimate satellite receiver equipment. As we discuss fully below in Section III(A) of the Petition, Congress enacted the 1988 Satellite Act amendments to the Federal Communications Act for the purpose of stopping such modifications — conduct that was not even illegal under § 605(e)(4) as it existed prior to passage of the 1988 amendments. By holding that this core piracy conduct does not violate § 605(e)(4), the Court of Appeals has taken away from DIRECTV and other participants in the satellite broadcast industry a key tool provided by Congress to combat piracy and protect their multi-billion dollar investments in satellite infrastructure.

Finally, this Court should consider this case because the current circuit splits regarding § 605(e)(4) result in disparate and inequitable treatment of individuals who engage in piracy and broadcasters in the satellite industry. In addition to the civil penalties discussed above, it is a federal crime to violate § 605(e)(4) punishable by a fine up to $500,000 and imprisonment up to five years, *per device*. These are serious penalties that should be applied consistently throughout the country, given Congress's express desire to establish a national enforcement regime to combat satellite piracy. Application of the Federal Communications Act to combat satellite piracy should not turn on the state in which the act of piracy is committed. As a result, regardless of whether this Court believes that the Court of Appeals was right or wrong in its interpretation of § 605(e)(4), it should grant the Petition to ensure that the prohibitions and penalties of the Federal Communications Act are applied consistently to all defendants across all jurisdictions.

III. THE COURT OF APPEALS' OPINION IS WRONG.

A. The Court of Appeals' Ruling that Modification of Legitimate Devices Does Not Violate § 605(e)(4) Is Contrary to the Language and History of the Federal Communications Act.

If the Court of Appeals' decision is allowed to stand, it will mean that the 1988 Satellite Act amendments to the Federal Communications Act did not accomplish one of Congress's primary objectives in enacting the amendments, at least for the states within the Ninth Circuit's jurisdiction. As we demon-

strate below, it is undeniable that one of Congress's primary goals in enacting the 1988 Satellite Act amendments was to criminalize the modification of legitimate devices to transform them into pirate access devices and to make civil remedies available to those who are aggrieved by such acts of piracy. *See* 47 U.S.C. §§ 605(e)(3)(A), (e)(4).

In the decision below, however, the Court of Appeals held that the Respondents' modification of DIRECTV access cards did not violate § 605(e)(4) because the devices subject to modification — DIRECTV's access cards — are not "primarily of assistance in the unauthorized decryption of satellite cable programming." App. 11a-12a. In coming to this conclusion, the Court of Appeals only considered the functionality of DIRECTV access cards before they are modified:

> "DIRECTV's access card is used in every legitimate system to limit a receiver's decryption of programming to that for which the subscriber has paid. While the card's centrality to DIRECTV's efforts to prevent the pirating of satellite transmissions makes the cards targets for pirates' modification, we reject DIRECTV's argument that their access cards are devices 'primarily of assistance in the unauthorized decryption of satellite cable programming.'" App. 12a.

The Court of Appeals' tunnel vision in its approach to analyzing whether DIRECTV's access cards could qualify as pirate access devices was error. As we discussed in Section I, the United States Courts of Appeals for the Fifth, Sixth, Eighth and Tenth Circuits took a different approach and also considered the functionality of the devices at issue *after*

they had been modified to determine whether the devices qualified as devices "primarily of assistance in . . . unauthorized decryption" for purposes of 47 U.S.C. § 605(e)(4). *See supra* pp. 9-11, discussing *United States* v. *One Macom Video Cipher II*, 985 F.2d 258, 261 (6th Cir. 1993); *United States* v. *Harrell*, 983 F.2d 36, 38-40 (5th Cir. 1993); *United States* v. *Davis*, 978 F.2d 415, 419-20 (8th Cir. 1992) (en banc); *United States* v. *McNutt*, 908 F.2d 561, 564-65 & n.2 (10th Cir. 1990).

The text of 47 U.S.C. § 605(e)(4) supports the approach taken by the Fifth, Sixth, Eighth and Tenth Circuits and cannot be reconciled with the approach taken by the Court of Appeals below. The provision imposes liability upon "[a]ny person who . . . modifies . . . *any* . . . device or equipment, knowing or having reason to know that the device or equipment is primarily of assistance in the unauthorized decryption of satellite cable programming. . . ." 47 U.S.C. § 605(e)(4) (emphasis added). Nothing in § 605(e)(4) instructs a Court to look only at the function of a device before it is modified in determining whether the device is "primarily of assistance" in piracy.

The language used by Congress applies just as literally to prohibit the modification of devices that, *after* they are modified, are primarily of assistance in piracy. The Court of Appeals' conclusion to the contrary impermissibly deprives the term "modify" in § 605(e)(4) of meaning.

To the extent that there is any ambiguity regarding the scope of 47 U.S.C. § 605(e)(4), it is easily resolved by looking to Congress's intent when it enacted the 1988 Satellite Act amendments to the Federal Communications Act. As this Court observed when interpreting 47 U.S.C. § 605 in *Rathbun* v.

United States, "[e]very statute must be interpreted in the light of reason and common understanding to reach the results intended by the legislature." 355 U.S. 107, 109 (1957). More recently, this Court reiterated this point in *McCreary County* v. *American Civil Liberties Union*, stating that "[e]xamination of purpose is a staple of statutory interpretation that makes up the daily fare of every appellate court in the country . . . ." 545 U.S. 844, 861 (2005).

When the Ninth Circuit interpreted 47 U.S.C. § 605(e)(4) in this case, it incorporated neither "reason" nor "the results intended by the legislature" into its analysis. As for reason, it would have made no sense for Congress to decide to punish only those who try to improve upon pre-existing piracy devices but not those who take legitimate devices, particularly receivers and access cards, and turn them into piracy devices. Nor does it make sense for Congress to prohibit the "assembly" of pirate access devices from scratch but permit the creation of pirate access devices through the modification of legitimate devices. As for the results intended by the legislature, it is clear that Congress's primary goal in enacting the 1988 Satellite Act amendments was specifically to prohibit the modification of legitimate satellite receivers to transform them into pirate access devices.

The legislative history of the 1988 Satellite Act demonstrates that Congress understood how piracy was being conducted and specifically amended the Federal Communications Act by including a prohibition of such modification to address this specific problem. The House Committee specifically described the process by which such piracy is conducted, emphasizing that it most commonly occurs

through the *modification* of legitimate satellite receivers:

> "In general, 'piracy' refers to the decoding or decryption of scrambled programming without the authorization of the programmer nor payment for the programming. *This theft of service is accomplished by alerting* [sic] *legitimate decoders*, such as the Video-Cypher II, with illicit decoder technology. For example, legitimate chips which decode the service are cloned and placed in decoder boxes to which access is restricted." H.R. Rep. No. 100-887 (II), at 14 (1988), 1988 U.S.C.C.A.N. 5577, 5642 (emphasis added).

The House Committee then observed that almost one-half of the satellite receiving systems in use were *modified* to pirate satellite transmissions, stating that "[t]he Satellite Broadcasting and Communications Association has indicated that there are approximately 350,000- 400,000 pirated descrambler boxes, compared with about 400,000 *untampered boxes*." *Id.* (emphasis added). The Committee reiterated this point later in the report, stating that "[i]t has been estimated than more than one-third of the one million VideoCipher III descramblers (the industry's de factor standard) sold by manufacturer General Instrument have been *compromised* by black market decoding chips." *Id.* at 28-29, 1988 U.S.C.C.A.N. at 5657-5658 (emphasis added).

There is also no question that this modification of legitimate receivers was the type of conduct that Congress was specifically targeting with the 1988 Satellite Act amendments. Prior to the enactment of the 1988 Satellite Act amendments, 47 U.S.C. § 605(e)(4) did not prohibit "modification." In its

report, the House Committee made clear that stopping such modification was a key purpose of the 1988 Satellite Act amendments, stating that "[t]he Committee's amendment is intended to deter piracy practices by * * * making the manufacture, sale, *modification*, importation, exportation, sale or distribution of devices or equipment with knowledge that its primary purpose is to assist in unauthorized decryption of satellite cable programming expressly actionable as a criminal act." *Id.* at 28, 1988 U.S.C.C.A.N. at 5657 (emphasis added).

Given the history of satellite piracy and Congress's response in the 1988 Satellite Act amendments, it is clear that the Court of Appeals' holding here cannot be reconciled with Congress's intent. Under the Court of Appeals' analysis, the modification of legitimate VC II descramblers — even if done for commercial advantage rather than personal use — would not run afoul of § 605(e)(4), because the VC II was "not a device 'primarily of assistance' in piracy" even when modified for that purpose, as was the case with the access cards here. *See* App. 11a-12a. This reading of the statute defeats the purpose for which Congress passed the 1988 Satellite Act amendments to the Federal Communications Act by sanctioning the very conduct that motivated Congress to enact the amendments.

B. The Panel Majority's Ruling that § 605(e)(4) Cannot Apply to End-Users Contradicts the Plain Words of the Statute.

The Court of Appeals' holding that § 605(e)(4) only applies to commercial actors — or "bigger fish" as the Court of Appeals called them — cannot be reconciled with the text of § 605(e)(4) or the structure of the

Federal Communications Act. As we discussed in Section I, the United States Courts of Appeals for the Fourth and Fifth Circuits have adopted the contrary interpretation that § 605(e)(4) applies to every person — commercial actor and individual end-user alike — who manufactures, assembles, modifies, imports, exports, sells, or distributes a device with knowledge that the device is "primarily of assistance" in piracy.

The conclusion adopted by the Fourth and Fifth Circuits is the only interpretation permitted by the plain text of § 605(e)(4). As the Fifth Circuit recognized in *Robson*, the first two words of § 605(e)(4) — "any person" — speak directly to the question whether individuals who modify or assemble devices for their own use can be held liable for violating § 605(e)(4). *See* 420 F.3d at 543-44. The Court of Appeals ignored the words "any person" in its discussion of whom § 605(e)(4) targets. This oversight is remarkable, given that the decision of the Court of Appeals was in obvious conflict with prior decisions of the Fourth and Fifth Circuits that were based, in important part, upon the existence of the words "any person" in § 605(e)(4). Instead of addressing these decisions and the significance of the words "any person," the Court of Appeals assumed, without providing any justification, that when Congress wrote the words "any person," Congress only meant a subcategory of all persons — "those who make piracy devices for commercial purposes." App. 13a. Without question, the Court of Appeals "insert[ed] words that are not now in the statute" in contravention of this Court's precedent. *Marchetti* v. *United States*, 390 U.S. 39, 60 n.18 (1968).

Additionally, Congress knew how to draw the distinction between commercial and personal use, but

did not do so in § 605(e)(4). In fact, Congress drew this very distinction in several provisions in the Federal Communications Act that are in close proximity to § 605(e)(4). *See, e.g.*, 47 § 605 (e)(3)(C)(ii) (imposing increased damages when the violation is for "commercial advantage or private financial gain"). As Judge Siler noted in dissent, "[i]f Congress had intended to limit its [§ 605(e)(4)'s] reach to commercial use, it would have said so." App. 16a.

The Court of Appeals' failure to apply § 605(e)(4) to end-users also stems from a concern that the Federal Communications Act provides "significantly harsher penalties" for violations of (e)(4) than for violations of subsection (a). App. 13a. According to the Court of Appeals, the differences in penalties indicate "that Congress intended that it [§ 605(e)(4)] apply to those who make piracy devices for commercial purposes rather than to end-users who employ piracy devices for individual personal use." *Id.* The Court of Appeals overstated the significance of the difference between the penalties for violations of § 605(a) and § 605(e)(4).

As an initial matter, the disparity between the penalties for violations of § 605(a) and § 605(e)(4) is justified. Persons who intercept encrypted satellite transmissions in violation of § 605(a) are subject to statutory damages ranging from $1,000 to $10,000, while persons who violate § 605(e)(4) are subject to statutory damages ranging from $10,000 to $100,000. 47 U.S.C. § 605(e)(3)(C)(i)(II). Thus, the upper limit of damages for interception and the lower limit for modifying devices is exactly the same. In this case, Huynh and Oliver could have purchased access cards that had already been modified (*i.e.*, "pirated" cards) and simply inserted the cards into their receivers

to obtain free programming. This conduct requires little technical sophistication and violates § 605(a). Instead, Huynh and Oliver used unloopers to modify pirated DIRECTV access cards that had already once been disabled by DIRECTV's anti-piracy countermeasures. This conduct requires greater knowledge, sophistication and commitment regarding the illicit science of piracy and has proven substantially more difficult for DIRECTV to stop with technological countermeasures. Individuals who engage in such sophisticated practices should be punished at least as severely as the maximum penalty imposed upon an individual who merely inserts a pirated access card into a receiver.

Additionally, the wide range of damages available for violation of § 605(e)(4) supports the conclusion that the provision was intended by Congress to apply to both commercial and private activity. By establishing a $10,000 minimum penalty and a $100,000 maximum penalty, Congress provided courts with the latitude necessary to distinguish between end-users who modify a device for their own personal use and commercial actors who modify devices for profit. Moreover, Congress crafted the penalty provisions of the Federal Communications Act to penalize commercial actors far more severely than individual end-users. The penalties imposed for violations of § 605(e)(4) are imposed *per device*. 47 U.S.C. § 605(e)(4). As a result, the total penalties imposed upon commercial actors, who are likely to modify many more devices, are potentially orders of magnitude larger than the penalties imposed upon individual end-users.

In short, the Court of Appeals' conclusion that § 605(e)(4) only applies to commercial actors is

without merit. Accordingly, this Court should grant a writ of certiorari in this case to make clear, consistent with the decisions of the Fourth and Fifth Circuits, that § 605(e)(4) covers the conduct of any person who — whether for commercial or personal use — modifies devices with knowledge that the devices are primarily of assistance in satellite piracy. Only then will Congress's goal of creating a national enforcement regime to combat satellite piracy be fulfilled.

CONCLUSION

For these reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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April 2, 2008

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed Sept. 11, 2007]

No. 05-16361
D.C. No.
CV-04-03496-CRB

DIRECTV, INC.,
Plaintiff-Appellant,

v.

HOA HUYNH,
Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of California
Charles R. Breyer, *District Judge*, Presiding

No. 05-16362
D.C. No.
CV-04-03454-SBA

DIRECTV, INC.,
Plaintiff-Appellant,

v.

CODY OLIVER,
Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of California
Saundra B. Armstrong, *District Judge*, Presiding

OPINION

Argued and Submitted
May 16, 2007—San Francisco, California

Before: Betty B. Fletcher, Eugene E. Siler, Jr.,* and Michael Daly Hawkins, *Circuit Judges*.

COUNSEL

Marc J. Zwillinger, Washington, D.C.; Howard R. Rubin, James A. Silver, Sonnenschein Nath & Rosenthal LLP, Washington, D.C.; Suzanne M. Burke, Buschalter Nemer, Irvine, California, for the plaintiff-appellant.

Jason Schultz, Electronic Frontier Foundation, San Francisco, California; Jennifer Stisa Granick, Trevor D. Dryer, Center for Internet and Society, Stanford Law School Cyberlaw Clinic, Stanford, California, for the amicus curiae.

OPINION

B. FLETCHER, *Circuit Judge*:

In the past three decades, satellite television programming has grown from nonexistence into a booming business, and piracy of such programming has grown apace. This case involves the attempts of a

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* The Honorable Eugene E. Siler, Jr., Senior United States Circuit Judge for the Sixth Circuit, sitting by designation.

satellite programming provider to fight piracy among end-users of pirating technology through use of § 605(e)(4) of the Federal Communications Act.

I.

A.

Appellant DirecTV, Inc. ("DirecTV") furnishes satellite television programming in subscription and pay-per-view formats to customers who have purchased both the programming and the necessary equipment. In order to watch the encrypted DirecTV programming, a customer must acquire a satellite dish, an integrated receiver decoder, and a smart card, which DirecTV calls an "access card." The satellite dish receives DirecTV's encrypted signals and transmits them to the receiver, which decrypts the signal and sends it to the customer's television. Software in the access card directs the receiver to decrypt only the signals conforming to the customer's subscription package.

Individuals who seek to watch DirecTV programming without payment ("pirates") have developed methods of decrypting DirecTV's signals without subscription. By reprogramming or replacing legitimate access cards with illicit decoder technology, pirates have managed to gain unauthorized access to all of DirecTV's programming.

DirecTV fights pirates by transmitting electronic countermeasures ("ECMs") that disable illegally modified access cards by sending their access software into a loop. Once an ECM has disabled, or "looped," an illegal card, the card will not direct its receiver to access DirecTV programming unless the access card is reprogrammed. One such reprogramming device, and the device relevant on this appeal, is an "un-

looper," a printed circuit board that restores functionality to a disabled access card by resolving the software loop created by the ECM. As amicus acknowledges, most unloopers currently are configured exclusively for pirating DirecTV's satellite signal.

B.

DirecTV's fight against piracy makes frequent use of the courts. *See* http://www.hackhu.com (website maintained by DirecTV chronicling anti-piracy litigation actions against 25,000 defendants). In the consolidated cases at bar, DirecTV brought claims against two end-users of pirating technology, defendants-appellees Hoa Huynh and Cody Oliver. The complaints allege that the defendants each purchased one unlooper and used it "to illegally modify DIRECTV Access Cards." Complaint at 4, *DirecTV, Inc. v. Huynh*, No. 04-cv-3496- CRB; see also Complaint at 3, *DirecTV, Inc. v. Oliver*, No. 04-cv-3454-SBA.[1] According to the com-

[1] The complaints, which charged identical claims and made the same allegations as to § 605(e)(4) for each appellee, read in relevant part:

> [Appellees] knowingly manufactured, assembled, sold, distributed, or modified an electronic, mechanical or other device or equipment knowing, or having reason to know, that the device or equipment is used primarily in the assistance of the unauthorized decryption of satellite programming, or direct-to-home services, or is intended for any other prohibited activity. Upon information and belief, [Appellees] actively programed and reprogrammed DIRECTV Access Cards and designed electronic systems for use in surreptitiously obtaining DIRECTV satellite programming. Further, by removing and inserting Pirate Access Devices and/or inserting illegally programmed Access Cards into valid DIRECTV Receivers, [Appellees] engaged in the unlawful assembly and/or modification of devices primarily of assistance in the unauthorized decryption of satellite programming.

plaints, these actions constituted conversion and violated both the Federal Communications Act of 1934, as amended, 47 U.S.C. § 605(a), (e) and the Electronic Communications Privacy Act, 18 U.S.C. §§ 2510-2521.

Defendants failed to appear or otherwise respond to DirecTV's complaints; in defaulting, defendants are deemed to have admitted all well-pleaded factual allegations contained in the complaints. *See* Fed. R. Civ. P. 55(a); *Benny v. Pipes*, 799 F.2d 489, 495 (9th Cir. 1986). DirecTV moved for a default judgment and $20,000 in statutory damages against each defendant for violations of 47 U.S.C. § 605(e)(4), or alternatively, for violations of 18 U.S.C. § 2520(a), or alternatively, for violations of 47 U.S.C. § 605(a). The district court issued two separate orders in which it granted DirecTV's motions for default judgment as to liability and damages under 18 U.S.C. § 2520(a), declined to grant default judgment pursuant to 47 U.S.C. § 605(e)(4), and declined to reach the issue of liability under § 605(a). DirecTV appeals from the district court's decision not to grant default judgment as to liability under § 605(e)(4).[2]

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[2] 47 U.S.C. § 605(e)(4) reads:

> Any person who manufactures, assembles, modifies, imports, exports, sells, or distributes any electronic, mechanical, or other device or equipment, knowing or having reason to know that the device or equipment is primarily of assistance in the unauthorized decryption of satellite cable programming, or direct-to-home satellite services, or is intended for any other activity prohibited by subsection (a) of this section, shall be fined not more than $500,000 for each violation, or imprisoned for not more than 5 years for each violation, or both. For purposes of all penalties and remedies established for violations of this paragraph, the pro-

In Oliver's case, the district court (the Honorable Saundra B. Armstrong presiding) stated that "47 U.S.C. § 605(e)(4) is meant to target upstream manufacturers and/or distributors of illegal pirating devices." *DirecTV, Inc. v. Oliver*, No. 04-cv-3454, 2005 WL 1126786, at *3 (N.D. Cal. May 12, 2005) (order granting default judgment pursuant to 18 U.S.C. § 2520(a), but not pursuant to 47 U.S.C. § 605(e)(4)). Stating that a showing that defendant "distributed or sold equipment" was necessary to establish a violation of § 605(e)(4), id. at *4, the district court concluded that the complaint's lack of any allegation that Oliver had sold or distributed pirating devices meant that DirecTV had pled insufficient facts to establish a violation of 47 U.S.C. § 605(e)(4). The court, therefore, declined to grant a default judgment against appellees on that ground. *Id.*

In Huynh's case, the district court (the Honorable Charles R. Breyer presiding) dismissed the allegation that Huynh's insertion of a modified access card into a DirecTV receiver constituted "assembl[ing]" a piracy device, stating that a contrary ruling would "totally destroy the distinction between 605(e)(4) and 605(a)." *DirecTV, Inc. v. Huynh*, No. 04-cv-3496-CRB, at 16 n.11 (N.D. Cal. May 31, 2005) (memorandum and order granting default judgment pursuant to 18 U.S.C. § 2520(a), but not pursuant to 47 U.S.C. § 605(e)(4)). The court next concluded that § 605(e) did not apply to allegations that Huynh programmed and reprogrammed a smart card. *Id.* at 16 (noting statutory damages range of $1,000-$10,000 for violations of § 605(a) and range of $10,000-$100,000 for violations of § 605(e)(4)). Finding significance in Congress's

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hibited activity established herein as it applies to each such device shall be deemed a separate violation.

decision to create different liabilities for users and manufacturers of pirating devices in § 605(a) and (e)(4) respectively, the district court determined that applying § 605(e)(4) to Huynh's alleged conduct "would nullify the distinction built into the statute." Accordingly, the district court concluded that DirecTV did not plead a violation of § 605(e)(4). *Id.*

II.

We have jurisdiction pursuant to 28 U.S.C. § 1291 to review the default judgments. We review them for abuse of discretion. *Aldabe v. Aldabe*, 616 F.2d 1089, 1092-93 (9th Cir. 1980); *see also Eitel v. McCool*, 782 F.2d 1470, 1471-72 (9th Cir. 1986) (setting out factors to guide district court's determination regarding the appropriateness of granting a default judgment). We review de novo questions of statutory construction such as the reach of § 605(e)(4). *SEC v. Gemstar TV Guide Int'l, Inc.*, 367 F.3d 1087, 1091 (9th Cir. 2004).

III.

A.

Home reception of satellite television programming began in 1976, one year after Home Box Office, Inc. (HBO) began satellite transmissions of its movies to cable television providers. H.R. Rep. No. 100-887(II), at 10 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5577, 5639. At that time, home reception of such signals was of questionable legality, as § 605[3] of the Federal

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[3] In 1976, § 605 read:

> Except as authorized by chapter 119, title 18, United States Code, no person receiving, assisting in receiving, transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmis-

Communications Act outlawed the unauthorized reception of radio communications. 47 U.S.C. § 605 (1968); *see also Chartwell Commc'ns Group v. Westbrook*, 637 F.2d 459, 466 (6th Cir. 1980) (holding the unauthorized reception of television signals intended for cable television operators violated § 605). Congress clarified the legality of home reception of satellite television programming in the Cable Communications Policy Act of 1984 ("Cable Act") by outlawing the unauthorized reception of satellite programming unless the programming was not encrypted or a sub-

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> sion or reception . . . . No person not being authorized by the sender shall intercept any radio communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person. No person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by radio and use such communication (or any information therein contained) for his own benefit or for the benefit of another not entitled thereto. No person having received any intercepted radio communication or having become acquainted with the contents, substance, purport, effect, or meaning of such communication (or any part thereof) knowing that such communication was intercepted, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of such communication (or any part thereof) or use such communication (or any information therein contained) for his own benefit or for the benefit of another not entitled thereto. This section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication which is broadcast or transmitted by amateurs or others for the use of the general public, or which relates to ships in distress.

Pub. L. No. 90-351, 82 Stat. 197 (codified at 47 U.S.C. § 605 (1968)). This section was redesignated § 705 by the Cable Communications Policy Act of 1984, Pub. L. No. 98-549, § 6(a), 98 Stat. 2779. However it is still codified as § 605, now under subheading (a).

scription process had not been created. Pub. L. No. 98-549, § 5, 98 Stat. 2779 (codified at 47 U.S.C. § 605(a)-(b) (1984)). The Cable Act substantially increased penalties for unauthorized signal reception by pirates seeking "commercial advantage or private financial gain." *Id.* (codified at 47 U.S.C. § 605(d)(1)-(2) (1984)). It subjected to penalty the "importation, manufacture, sale, or distribution of equipment" to be used for unauthorized signal reception, *id.* (codified at 47 U.S.C. § 605(d)(4) (1984)); in 1988, Congress added prohibitions on the assembly or modification of equipment to be used for unauthorized signal reception. Pub. L. No. 100-667, § 205(12), 102 Stat. 3935 (codified at 47 U.S.C. § 605(e)(4) (1988)). The 1988 amendments again increased the penalties for unauthorized signal reception while maintaining the Cable Act's system of authorizing harsher punishment for pirates motivated by commercial gain. *Id.* at § 205(2), (3), (9)-(11) (codified at 47 U.S.C. § 605(e)(1)-(3) (1988)). For example, while end-users of pirating technologies faced criminal sanctions of a fine of up to $2,000 or imprisonment for up to six months, § 605(e)(1), pirates motivated by commercial gain faced criminal sanctions of a fine of up to $50,000, imprisonment for up to two years, or both, § 605(e)(2). The civil penalties reflected this two-tiered punishment rubric: end-users of pirating technology faced statutory damages of $1,000 to $10,000 per violation, while upstream pirates—the programmers and sellers of pirating technology—faced statutory damages of $10,000 to $100,000 per violation. 47 U.S.C. § 605(e)(3)(C)(i)(II) (1988). This two-tiered damages provision has not been substantively changed since 1988. *See* 47 U.S.C. § 605(e)(1)-(3) (1996).

The question presented in these appeals is whether appellees' use of the unloopers constituted assembly

and modification of piracy devices in violation of § 605(e)(4).

B.

1. Specific Allegations

A. Assembly

[1] The complaints assert that "by removing and inserting" into DirecTV receivers previously—disabled access cards that had been restored by an unlooper, appellees illegally assembled piracy devices in violation of subsection (e)(4). Complaint at 6, *DirecTV, Inc. v. Huynh*, No. cv-04-3496-CRB; Complaint at 6, *DirecTV, Inc. v. Oliver*, No. cv-04-3454-SBA. We reject the premise because this interpretation of "assembly" would sweep into the ambit of subsection (e)(4) even the minimum actions necessary to intercept a satellite signal that are violations of subsection (a). Adopting this interpretation would destroy the two-tiered approach established by Congress and would render subsection (a) redundant. We must make "every effort not to interpret a provision in a manner that renders other provisions of the same statute inconsistent, meaningless or superfluous." *Boise Cascade Corp. v. EPA*, 942 F.2d 1427, 1432 (9th Cir. 1991); *see also United States v. Novak*, 476 F.3d 1041, 1048 (9th Cir. 2007) ("We avoid whenever possible statutory interpretations that result in superfluous language."). Therefore, we reject DirecTV's attempt to collapse the distinction between subsections (a) and (e) and hold that inserting modified access cards into DirecTV receivers does not constitute assembly as that term is used in subsection (e)(4).

B. Modification[4]

[2] DirecTV contends that by "programm[ing] and reprogramm[ing]" DirecTV access cards, appellees modified devices in violation of § 605(e)(4). Because subsection (e)(4) prohibits only the modification of devices that are "primarily of assistance in the unauthorized decryption of satellite cable programming," the question is whether DirecTV's access cards are such devices "primarily of assistance" in piracy. Our decision in *Allarcom Pay Television, Ltd. v. Gen. Instrument Corp.*, 69 F.3d 381 (9th Cir. 1995), is instructive. In that case, Allarcom, a television programming provider, brought an action against the manufacturer of the VideoCipher II system ("VC II"), General Instrument, alleging a violation of § 605(e)(4). *Id.* at 383-84. The VC II encrypted and decrypted satellite television signals, *id.* at 384, and set the industry standard for encryption technology, *id.* at 386. Because many pirates modified the VC II in order to illicitly intercept satellite signals, Allarcom alleged that General Instrument's sale of the VC II constituted distribution of a device "primarily of assistance in the unauthorized decryption of satellite cable programming." *Id.* at 385. We rejected Allarcom's argument, holding that an "anti-piracy device" such as the VC II is not a device " 'primarily of assistance' in piracy" simply because some modify it in order to pirate satellite programming. *Id.* at 386. As we explained, "the VC II is useful for piracy only because

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[4] The complaints' allegations that appellee "designed electronic systems for use in surreptitiously obtaining DIRECTV satellite programming" does not constitute a well-pleaded allegation, *see* Fed. R. Civ. P. 55(a), because it does not make clear what systems were designed or what piracy devices were modified.

so much of the [subscription television] industry employs it to prevent piracy. Therefore, sale of that product . . . does not violate the FCA ([Federal Communications Act])." *Id.* By the same token, DirecTV's access cards, which are anti-piracy devices integral to DirecTV's subscription process, are not devices "primarily of assistance" in piracy. DirecTV's access card is used in every legitimate system to limit a receiver's decryption of programming to that for which the subscriber has paid. While the card's centrality to DirecTV's efforts to prevent the pirating of satellite transmissions makes the cards targets for pirates' modification, we reject DirecTV's argument that their access cards are devices "primarily of assistance in the unauthorized decryption of satellite cable programming." *See* § 605(e)(4). Therefore, the complaints fail to allege modification of a piracy device in violation of subsection (e)(4).

2. General Allegations

[3] In reviewing a default judgment, this court takes "the well-pleaded factual allegations" in the complaint "as true." *Cripps v. Life Ins. Co. of North America*, 980 F.2d 1261, 1267 (9th Cir. 1992); *see also* Fed. R. Civ. P. 55(a); *Benny*, 799 F.2d at 495. However, a "defendant is not held to admit facts that are not well-pleaded or to admit conclusions of law." *Nishimatsu Constr. Co. v. Houston Nat'l Bank*, 515 F.2d 1200, 1206 (5th Cir. 1975). DirecTV's allegations that parrot the language of subsection (e)(4) by alleging that appellees "knowingly manufactured, assembled, sold, distributed, or modified an electronic, mechanical or other device or equipment knowing, or having reason to know, that the device or equipment is used primarily in the assistance of the unauthorized decryption of satellite programming, or direct-

to-home services, or is intended for any other prohibited activity" are not well-pleaded facts; they are simply DirecTV's legal conclusions, which appellees are not held to have admitted through default. *See* Fed. R. Civ. P. 55(a); *Benny*, 799 F.2d at 495.

3. Statutory Context

[4] Reading § 605 as a whole makes clear that Congress intended to treat differently individuals who played different roles in the pirating system. In contrast to subsection (a)'s targeting of individuals who use piracy devices to intercept satellite signals, subsection (e)(4) aims at bigger fish—the assemblers, manufacturers, and distributors of piracy devices. The statute's two-tier damages provision treats each class quite differently, subjecting violators of subsection (e)(4) to significantly harsher penalties than those levied against violators of subsection (a). *See* 47 U.S.C. § 605(e)(3)(C)(i)(II). Because reprogramming access cards and inserting these modified access cards into DirecTV receivers is necessary to intercept signals in violation of subsection (a), treating these actions as violations of subsection (e)(4) would collapse the distinction Congress established. The context of subsection (e)(4) and its penalties indicate that Congress intended that it apply to those who make piracy devices for commercial purposes rather than to end-users who employ piracy devices for individual personal use. The district court properly determined that § 605(e)(4) does not apply to individual end-users. In so concluding, we join the majority of courts who have interpreted § 605(e)(4)'s application to end-users. *See, e.g., Kingvision Pay-Per-View, Ltd. v. Mendez*, No. 03cv2170, slip. op. at 2 & n.5 (E.D.N.Y. Dec. 28, 2006) (holding § 605(e)(4) inapplicable to end-users); *DirecTV, Inc. v. Turnbough*, No. 04-cv-2409-GEB-GGH, slip op. at 2

(E.D. Cal. Jan. 30, 2006) (same); *DirecTV, Inc. v. Bowen*, No. 04-cv-2407-GEB-GGH, slip op. at 2 (E.D. Cal. Dec. 8, 2005) (same); *DirecTV, Inc. v. Gagnard*, No. Civ. A. 03-2177-A, slip op. at 3 (W.D. La. Aug. 16, 2005) (holding that programming bootloaders does not constitute modification, and that inserting and removing access cards does not constitute assembly, within the meaning of § 605(e)(4)); *DirecTV, Inc. v. Neznak*, 371 F. Supp. 2d 130, 133 (D. Conn. 2005) (holding that the use of an unlooper is not a modification within the meaning of the statute); *Joe Hand Promotions v. Hernandez*, No. 03 Civ. 6132 (HB), slip op. at 3 (S.D.N.Y. June 30, 2004) (holding that § 605(a)(4) applies to distributors of pirating devices not to end-users of these devices); *DirecTV, Inc. v. Alvares*, No. Civ. A.L.: 03 38, slip op. at 3 (S.D. Tex. Mar. 23, 2004) (holding that the purchase of an unlooper did not violate § 605(e)(4)). *But see DirecTV, Inc. v. Robson*, 420 F.3d 532, 543-44 (5th Cir. 2005) (ruling that § 605(e)(4) is not categorically inapplicable to "individual users");[5] *Direct TV, Inc. v. Estrada*, No. Civ. A. L-03-cv-135, slip op. at 3 (S.D. Tex. Sept. 26, 2005) (holding that purchase of unlooper creates pre-

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[5] Although the Fifth Circuit refused to categorically exclude individual users from liability under § 605(e)(4), *see Robson*, 420 F.3d at 542-44 (rejecting district court's statement that 605(e)(4) "is a provision relating to manufacturers and sellers, rather than to individual users"), it did not address whether the types of activities individual users typically engage in (including the activities alleged in this case's two complaints) would violate § 605(e)(4)—e.g., whether inserting an access card into a receiver would constitute "assembly," or whether programming an access card would constitute "modification" of a device "primarily of assistance in the unauthorized decryption of satellite cable programming." *Compare supra* Parts III.B.1.A & III.B.1.B, *with* 420 F.3d at 542-44. Thus, we do not read our opinion to be in conflict with the Fifth Circuit's narrow holding in *Robson*.

sumption of modification in violation of § 605(e)(4)); *DirecTV, Inc. v. Crumlish*, No. Civ. A. 03-3265, slip op. at 1 (E.D. Pa. July 16, 2004) (holding that pleadings tracking statutory language established violation of § 605(e)(4)); *cf. DirecTV, Inc. v. Brasswell*, No. 4:03-cv-330A, slip op. at 2 (N.D. Tex. July 12, 2004) (holding that admission of repairing access cards "likely establishes" modification in violation of § 605(e)(4) but does not establish that defendant was the modifier).

Conclusion

[5] The district court properly refused to grant default judgment under § 605(e)(4). These complaints failed to state violations of subsection (e)(4), and further, subsection (e)(4) does not apply to personal use. Although the district court in *Oliver* abused its discretion by reading out of the statute the terms "assembles" and "modifies" in requiring allegation of sale or distribution in order to establish a violation of subsection (e)(4), we nonetheless affirm the *Oliver* holding on the alternative grounds explained above. *See Orsay v. U.S. Dep't of Justice*, 289 F.3d 1125, 1132 (9th Cir. 2002) ("We may affirm the district court's judgment on any ground supported by the record, even if the district court did not rely on the ground.").

AFFIRMED.

SILER, Circuit Judge, dissenting:

I respectfully dissent, for I would find that the district courts erred in determining that 47 U.S.C. § 605(e)(4) does not apply to individual use. The language in the statute is clear and it is in the disjunctive. That is, it forbids specific conduct by "any person who manufactures, assembles, modifies, . . . or distributes any electronic, mechanical or other device or

equipment." The statute does not limit its application to manufacturers and sellers. If Congress had intended to limit its reach to commercial use, it would have said so.

Although it is a matter of first impression in this circuit, other circuits have held that § 605(e)(4) is not categorically inapplicable to end users. *See DirecTV, Inc. v. Pernites*, 200 Fed. Appx. 257, 2006 WL 2711978, at *1 (4th Cir. Sept. 21, 2006); *DirecTV, Inc. v. Robson*, 420 F.3d 532, 543-44 (5th Cir. 2005). Moreover, the Second Circuit has ordered the entry of a default judgment based on a complaint similar to the one in this case that tracked the language of the statute. *See DirecTV, Inc. v. Meinhart*, 158 Fed. Appx. 309, 311, 2005 WL 3370463, at *1 (2d Cir. Dec. 9, 2005). Apparently no circuit has yet to rule to the contrary.

For these reasons, I would reverse the decisions of the district court in denying the motions for default judgments in both cases.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF CALIFORNIA

No. C 04-3496 CRB

DIRECTV, INC.,

Plaintiff,

v.

HOA HUYNH,

Defendant.

MEMORANDUM AND ORDER GRANTING
MOTION TO ENTER DEFAULT JUDGMENT

Currently pending before this Court are several motions for default judgment in cases brought by DirecTV, Inc. ("DirecTV") against individuals that it alleges have illegally intercepted its satellite broadcasts of television programming. These cases represent only a tiny fraction of cases filed by DirecTV in district courts nationwide against alleged pirates. In nearly all of these cases, DirecTV alleges that the defendants bought devices used either to emulate or reprogram DirecTV access cards in order to illegally receive plaintiff's satellite programming. The complaints further allege that the defendants in fact used these "pirate access devices" to those ends and did receive such programming.

Subsequent to the entry of defaults in these cases by the clerk, the Court conducted an evidentiary hearing on March 17, 2005 in which DirecTV offered expert testimony supporting the inference that the defendants' purchase of the pirate access devices

establishes that they illegally intercepted DirecTV's signal.[1] The Court also considered argument by amicus curiae the Electronic Frontier Foundation ("EFF"), which expressed concern at what they contend is plaintiff's attempt to infer unlawful conduct from the lawful purchase of technology that has both illegitimate and legitimate uses.[2] Having carefully considered all of the positions presented, the Court has determined that it should enter default judgment and award damages as detailed below.

BACKGROUND

A. DirecTV

Plaintiff DirecTV provides satellite television programming on a subscription and pay-per-view basis to over 13 million paying customers. In order to become a DirecTV customer, an individual must purchase the appropriate hardware, including a DirecTV satellite dish and an integrated receiver decoder ("receiver"). The satellite dish receives encrypted signals from DirecTV's orbiting satellites and sends the signal to the receiver, which decrypts the signal and transmits it to the consumer's television.

Inserted into the receiver is a removable credit-card sized device containing two microchips called a

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[1] The transcript of this testimony is attached hereto as Exhibit A to this Memorandum.

[2] EFF also raised concerns regarding what they characterize as manipulative misrepresentations made by DirecTV in demand letters sent to suspected pirates. The propriety of such practices are, of course, not before this Court and therefore have not been considered here. *But see Blanchard v. DirecTV, Inc.*, 123 Cal.App.4th 903 (Cal. Ct. App. 2004) (affirming dismissal of class action brought by DirecTV demand letter recipients alleging unfair business practices and extortion).

"conditional access module" and commonly referred to as a smart card. Smart cards are essentially miniature computers containing their own software and memory. They are used in a number of applications, including as phone cards, personal identification cards and gift cards. DirecTV's smart cards contain data identifying the particular customer and the subscription package purchased. Using this information, the smart card tells the receiver which channels the receiver may and may not decrypt. DirecTV pirates were able to exploit this system by reprogramming DirecTV smart cards to unlock all of DirecTV's channels regardless of whether the user had paid for them. A related piracy strategy involved replacing the smart card entirely with a machine that would tell the receiver to decrypt channels without payment.

When DirecTV first became aware of these strategies, it invested in anti-piracy technology. For example, DirecTV's satellites broadcasted electronic countermeasures that disabled illegally reprogrammed smart cards. However, soon after the countermeasures were implemented, pirates were able to develop software patches that repaired access cards disabled by them. Therefore, for those pirates who knew of these fixes and were willing and able to apply them, the electronic countermeasures were only successful in temporarily discontinuing their illegal access to DirecTV.

The most effective countermeasure—dubbed "Black Sunday" by pirates—was originally believed by DirecTV to permanently disable a large proportion of illegally programmed smart cards. However, only three weeks after implementation of that countermeasure, new hardware and software emerged on

pirate websites that was able to repair and reprogram smart cards effected by Black Sunday.

B. Pirate Access Devices

In order to illegally receive DirecTV, pirates have employed various devices. Because of the widespread use of smart card technology, some of the devices labeled by DirecTV as "pirate access devices" may have legitimate uses separate from stealing DirecTV's programming. DirecTV's experts have highlighted for the Court the specific attributes of the equipment at issue in these lawsuits that make DirecTV confident that they were in fact purchased for the sole purpose of illegally descrambling DirecTV's signal. Those devices identified by plaintiff as pirate access devices are marketed as "unloopers," "bootloaders," "emulators," and "reader/writers."

Products marketed as "unloopers" and "bootloaders" are specialized smart card programmers that are effective in repairing smart cards damaged by DirecTV's electronic countermeasures. Unloopers[3] are constructed in a manner so specific to DirecTV piracy as to create a strong presumption that an individual who buys the device is using it for that purpose. First, unloopers apply a lower power supply to smart cards inserted into them than any other devices used to read, program or reprogram smart cards. The purpose of providing a lower voltage supply is to alter the processor on the smart card in a manner that is

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[3] DirecTV presented the Court with expert evaluations of unloopers marketed under several names, including "Whiteviper Super Unlooper," "Whiteviper UnlooperX," "KAC Unlooper," "Dual Pro All In One," "Terminator Unlooper," "Vector Fusion," and "MKII Unlooper." Each of these devices have substantially the same design and capacities with respect to DirecTV piracy.

useful in satellite piracy. DirecTV's experts have not been able to locate any other smart card application that is compatible with the unlooper's unique power supply system. Indeed, the unlooper's power system violates the universal standard for smart card devices and therefore is likely to damage smart cards that are used with it. A second attribute indicating use for piracy is that many unloopers are sold with microchips containing software which has no other use than to reprogram DirecTV's access cards in order to steal DirecTV.[4] Finally, a third indication is that unloopers are compatible with and recognized by software applications available on the internet which have the sole use of reprogramming DirecTV smart cards for the purpose of piracy. Together, these three attributes make an individual's possession of an unlooper highly suggestive of satellite piracy.

An "emulator" is a circuit board that is manufactured to be the same size and shape as a smart card, as well as to have the same external components.[5] Because of this design, emulators can be inserted into a DirecTV receiver in place of a smart card. While inserted, an emulator can be connected to a personal computer. The user can then, through the emulator, apply software applications from the computer to the DirecTV receiver to decrypt all of DirecTV's channels.

Nothing about this structure is necessarily suggestive of use for satellite piracy. However, DirecTV

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[4] For example, the MKII Unlooper was sold with firmware called "WTXBS," which stands for "Wild Thing Version X—Black Sunday." This software has no other use than pirating DirecTV's satellite signal.

[5] DirecTV's experts presented evaluations of devices marketed as a "Cobalt Emulator" and a "Vector Emulator." These devices are similar in their electrical design and capabilities.

identifies other emulator attributes which it contends indicates illegal use. Like smart cards, emulators have external metal contact points that connect to corresponding contact points on the inside of a DirecTV receiver in order to transmit information between the two. Unlike most smart card receptacles, DirecTV receivers are designed such that smart cards should be inserted into them with the metallic contact points facing downward. Most other smart card devices are made for the card to be inserted with the contact points facing upward or sideways. Emulators are designed to be compatible with DirecTV's atypical insertion design. Some of them contain a "This Side Up" instruction on one side, such that when they are inserted consistent with the instruction, the contact points face downward.[6] Therefore, because emulators share this unique quality with DirecTV's equipment, possession of an emulator suggests use for piracy. In addition, the emulators were advertised by pirate websites in a manner that indicated they had the ability to pirate DirecTV's signal. However, because DirecTV's receiver design is not wholly unique, and because a user could easily purchase an emulator and not heed the "This Side Up" instruction, emulators may possess some legitimate uses.

A smart card reader/writer is, quite intuitively, a device that allows the user to read and reprogram the software contained on a smart card.[7] Similar to emulators, those smart card reader/writers that were sold on pirate device websites contain some indication that they were used for DirecTV piracy. Many reader/

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[6] The "This Side Up" instruction is contained only on the Vector Emulator.

[7] Plaintiff presented as an example a "White Viper Reader/Writer."

writers used for legitimate uses contain a switch that detects the insertion of a smart card. The switch is useful for smart cards used for identification purposes, because it allows insertion of the card alone to initiate a log-in sequence rather than requiring the user to take the extra step of manually notifying the computer when the card has been inserted. Those reader/writers that DirecTV has identified as having been marketed and used for piracy do not contain this switch, and therefore do not have the functionality of more widely-used reader/writers. In addition, reader/writers used for DirecTV piracy were designed to have smart cards inserted into them with the contacts facing downward. Therefore, like emulators, possession of reader/writers is indicative (though not conclusively) of satellite piracy.

C. Other Evidence of Piracy

In addition to features inherent in the technology itself, DirecTV identified potential satellite pirates from other circumstantial evidence. Pirate access devices were sold on the internet by retailers such as "White Viper Technologies," "cansat2000," "Kick Ass Clones," and "Vector Technologies." DirecTV was able to identify individuals who were potentially using pirate access devices after executing searches of sales records held by these companies. For example, in the instant case DirecTV discovered that the defendant purchased an unlooper and a reader/writer from the website of White Viper Technologies for approximately $300. The White Viper website contained links to other internet pages which provided instructions on how to program DirecTV access cards for the purpose of piracy.

Once obtaining purchase records from pirate access device producers, DirecTV would also make attempts

to cross-reference the lists with their own subscription lists. A customer who had once held a DirecTV subscription was likely to still possess the equipment necessary to receive DirecTV's signal. Here, for example, the address at which Mr. Huynh received the pirate access devices was found in DirecTV's database as the address of a DirecTV subscriber from August 1998 to August 2000. The record also shows that Mr. Huynh purchased the pirate access devices in November 2000.

DirecTV's searches also revealed the e-mail addresses of pirate access device customers. DirecTV cross-referenced that information with data it possessed containing e-mail addresses of individuals who had participated in internet bulletin boards used to discuss DirecTV piracy. Mr. Huynh, for example, was connected to an e-mail address that was associated with seven different piracy web forums.

D. DirecTV's Losses

DirecTV's revenue losses from piracy are made up of two main components. First, DirecTV spends money on anti-piracy efforts. Second, individuals who illegally obtain DirecTV's signal without payment might otherwise have become paying customers.

In addition to the money it spends investigating and litigating piracy claims, DirecTV's anti-piracy campaign also includes inventing and implementing technological hurdles to satellite theft. Besides the money spent on electronic countermeasures, DirecTV also has repeatedly altered its smart cards in hopes of making them impervious to piracy. These efforts were ultimately successful with DirecTV's invention of a fourth-generation smart card in 2000. By April 2004, DirecTV was able to discontinue signal streams

accessible to the first three generations of access cards, thereby (as far as is known by DirecTV) finally extinguishing the efficacy of pirate access devices. These efforts, though ultimately effective, came at a great expense. For example, DirecTV spent $22 million developing and implementing the technology to move from the third-generation smart card to the fourth-generation card.

DirecTV's lost subscription revenues are much harder to quantify. The retail value of all the programming a DirecTV pirate has access to exceeds one million dollars per year. Of course, it would be impossible for an individual to view all of that programming and improbable that they would view even a fraction of it, since DirecTV typically airs repeat broadcasts of the same pay-per-view movie several times. Moreover, because satellite pirates are able to receive all the television they want without incurring any marginal cost for increased viewing, they likely consume much more television than they would if they had to pay for it. Indeed, it is likely the case that some pirates would never have subscribed to DirecTV at all if they had to pay for it. Thus, there is no satisfactory mechanism for setting the subscription losses to DirecTV. For its part, plaintiff relies on a trade publication that estimates its programming revenue losses at one billion dollars per year—a significant portion of their 2004 gross revenue of eight billion dollars.

Losses in subscription fees not only reduce DirecTV's total revenues directly but also endanger the company's relations with its programming providers. DirecTV does not produce or own any of the intellectual property that it broadcasts. Rather, it purchases programming directly from copyright hold-

ers, and also pays royalties to them based on the subscription fees they collect. Many of these programming suppliers have voiced serious concerns over the problem of satellite piracy, as it results in lost income for them as well.

PROCEDURAL HISTORY

All DirecTV cases in this district were originally referred to Judge James Ware to make a limited determination as to whether the actions should be joined. *See In re DirecTV, Inc.*, No. C-02-5912-JW (July 26, 2004). In an order dated July 26, 2004, Judge Ware determined that the actions should not be joined, and ordered DirecTV to re-file the cases as separate actions against separate defendants. In that order, Judge Ware also examined the showing necessary for plaintiff to establish a prima facie case under each of the statutory claims pled.

The complaint in the present action against Mr. Huynh was filed on August 23, 2004. Defendant was served on October 24, 2004. Plaintiff moved for entry of default on November 30, 2004 and the default was entered by the clerk on December 1, 2004. Plaintiff now moves for entry of default judgment.

JURISDICTION

When a court is considering whether to enter a default judgment, it has "an affirmative duty to look into its jurisdiction over both the subject matter and the parties." *In re Tuli*, 172 F.3d 707, 712 (9th Cir. 1999) ("To avoid entering a default judgment that can later be successfully attacked as void, a court should determine whether it has the power, i.e., the jurisdiction, to enter the judgment in the first place."). Here, personal jurisdiction was established when defendant was served in California. The Court has subject

matter jurisdiction because the plaintiff's claims arise under the Federal Communications Act of 1934, 47 U.S.C. § 605, and the Electronic Communications Privacy Act, 18 U.S.C. §§ 2510- 2521. *See* 28 U.S.C. § 1331. The Court also has supplemental jurisdiction over plaintiff's claim arising under state law. *See* 28 U.S.C. § 1367.

DISCUSSION

The complaint alleges that defendant purchased a "Viper Super Unlooper" and a "Viper Reader/Writer" from White Viper. Plaintiff pleads causes of action based on 18 U.S.C. § 2520(a); 47 U.S.C. § 605(e)(4), 47 U.S.C. § 605(a) and California common law. Plaintiff seeks $20,000 in damages pursuant to the damages provisions associated with sections 2520(a), 605(e)(4), and 605(a).

A. Legal Standard

The decision whether to enter a default judgment lies within the district court's discretion. *Aldabe v. Aldabe*, 616 F.2d 1089, 1092 (9th Cir. 1980). Upon entry of default, the factual allegations of the complaint that establish the defendant's liability are accepted as true, except for those regarding damages. *TeleVideo Systems, Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987); FED. R. CIV. P. 8(d). "Even after default, however, it remains for the court to consider whether the unchallenged facts constitute a legitimate cause of action, since a party in default does not admit mere conclusions of law." 10A Wright, Miller & Kane, *Federal Practice and Procedure*: Civil 3d § 2688, at 63 (1998); *see also, Quirindongo Pacheco v. Rolon Morales*, 953 F.2d 15, 16 (1st Cir. 1992) (per curiam) (despite the admissions upon default, the

court always has the power to require additional proof of any fact alleged as the basis for liability).

In exercising discretion to grant default judgment, the court may consider several factors:

> (1) the possibility of prejudice to the plaintiff, (2) the merits of plaintiff's substantive claim, (3) the sufficiency of the complaint, (4) the sum of money at stake in the action; (5) the possibility of a dispute concerning material facts; (6) whether the default was due to excusable neglect, and (7) the strong policy underlying the Federal Rules of Civil Procedure favoring decisions on the merits.

Eitel v. McCool, 782 F.2d 1470, 1471-72 (9th Cir. 1986).

B. 18 U.S.C. § 2520

1. Liability

The Electronic Communications Privacy Act, often referred to as the Federal Wiretap Act, imposes criminal liability for any person who "intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication." *See* 18 U.S.C. § 2511(1)(a). Section 2520(a) authorizes a civil action to be commenced by any person whose:

> electronic communication is intercepted, disclosed, or intentionally used in violation of this chapter may in a civil action recover from the person . . . which engaged in that violation such relief as may be appropriate.

18 U.S.C. § 2520(a).

Some courts have read the legislative history of the Wiretap Act to support the conclusion that satellite piracy is not encompassed within its scope. *See, e.g., DirecTV, Inc. v. DeCroce*, 332 F. Supp.2d 715, 720-21 (D.N.J. 2004). However, this Court is constrained to apply the law of the Ninth Circuit, which has held that "[a] person who views satellite television programming by use of a modified descrambler and a satellite dish 'intentionally intercepts' the satellite television signal, which is an 'electronic communication,'" *United States v. Lande*, 968 F.2d 907, 909 (9th Cir. 1992). Thus, the conduct alleged in the complaint falls within the scope of section 2511. *Id.* at 910.

The complaint alleges that defendant used pirate access devices to "decrypt and view" plaintiff's satellite television transmissions. This is sufficient to state a claim under section 2520(a). Mindful of the *Eitel* factors, particularly the strong evidence that the defendant used the pirate access devices to illegally intercept DirecTV's signal and that there is no indication that defendant's default is due to excusable neglect, the Court deems default judgment appropriate with respect to this cause of action.

2. Damages

The applicable damages provision of the Wiretap Act provides that "the court *may* assess as damages whichever is the greater of: (A) the sum of the actual damages suffered by the plaintiff and any profits made by the violator as a result of the violation; or (B) statutory damages of whichever is the greater of $100 a day for each day of violation or $10,000." 18 U.S.C. 2520(c)(2) (emphasis added). The peculiar damages structure of section 2520(c)(2) provides the Court with discretion to either award the statutory sum or nothing at all. *See DirecTV, Inc. v. Brown*, 371

F.3d 814, 818 (11th Cir. 2004) (joining three other circuits in holding that award of damages is discretionary). However, the Court may not award any amount between those two figures. *See DirecTV, Inc. v. Griffin*, 290 F. Supp.2d 1340, 1347-48 n.28 (M.D. Fla. 2003).

DirecTV calculates its actual damages as the total value of programming, including subscription and pay-per-view charges, viewed by defendant. Under this understanding, DirecTV assumes that defendant's use matched that of the top 10% of DirecTV customers (i.e. that he would have incurred $204.56 per month in charges), and also assumes that defendant was successful in pirating DirecTV's signal from the date of purchase until the April, 2004 (1,274 days), when the pirate access devices he owns became obsolete. Based on these assumptions, plaintiff argues that its actual damages were $8,561.28.

Plaintiff also claims that defendant violated the statute for 1,274 days. Under subsection 2520(c)(2)(B) plaintiff would therefore be entitled to $127,400, which is of course greater than $10,000. Therefore, statutory damages, and the maximum sum that plaintiff could make a claim for under the Wiretap Act, amount to $127,400.

In exercising its discretion over the award of damages in this default setting, the Court finds fault in both of plaintiff's damages calculations. Both are based on several unprovable assumptions. DirecTV calculates actual damages based on an estimate of the amount of television consumed by defendant. However, this is contrary to the typical understanding of "actual damages" as losses suffered by the plaintiff. *See* Black's Law Dictionary, 8th ed., at 416 (defining "actual damages" as "amount awarded . . .

to compensate for a proven injury or loss . . . . Also termed compensatory damages").[8] Defendant's benefit is a poor measure of plaintiff's actual losses since DirecTV's broadcasting costs are only marginally affected by a single pirate's illegal consumption of its programming. DirecTV's true actual damages from the individual pirate's activities should instead be measured by the total costs it has paid for anti-piracy efforts plus its total revenue losses divided by the total number of pirates. However each of these numbers is reducible to only a rough estimate and combining them would only compound their inaccuracy. The result of such a calculation could never withstand reasoned scrutiny.

Even if the value of what defendant watched were an appropriate measure of actual damages, the Court would still be relying on speculation regarding the amount of programming defendant viewed and the number of days defendant was able to pirate the signal. DirecTV's assumption that defendant used $204.56 per month in services is not on its face unreasonable, particularly given that defendant spent $300 on the piracy devices. However, the assumption that defendant consumed this much television consistently for nearly three and a half years is not well-supported. Given that it made no difference in terms of cost for defendant to watch as much or as little television as he liked, the actual subscription charges he would have incurred may have been far greater or lesser than DirecTV's esti-

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[8] While the statute also provides that actual damages be added to "any profits made by the violator," 18 U.S.C. 2520(c)(2), this still does not support plaintiff's restitution-based method of calculating damages. Plaintiff does not contend that defendant received any "profits" from his interception of plaintiff's signal.

mate. Moreover, there is little evidence that defendant was able to steal DirecTV programming for the entire period between his purchase of the devices until April, 2004. Not only does this calculation fail to allow time for shipping and installation, it also contradicts DirecTV's expert testimony that its electronic countermeasures at least temporarily disabled illegally reprogrammed smart cards. There is no reasonable way to ascertain whether defendant was technologically savvy enough to be able to continuously reprogram his smart card in order to continue receiving DirecTV's signal without significant interruption. Indeed, defendant may have never been able to operate the pirate access devices in the first place, or have abandoned their use once it became too difficult to find new software patches to overcome DirecTV's countermeasures.

Given these uncertainties, DirecTV's actual and per-day damage calculations have not been sufficiently supported. Therefore, these calculations are rejected, and instead the Court finds that 18 U.S.C. 2520(c)(2) provides for a damage calculation of the minimum statutory amount of $10,000. *See* 18 U.S.C. 2520(c)(2)(B).

The Court must next determine whether to award $10,000 or nothing at all. *See Brown*, 371 F.3d at 818. In making this determination, courts have examined several factors including: (1) whether the defendant profited from his violation; (2) whether there was any evidence that the defendant actually used his pirate access devices; (3) the extent of DirecTV's financial harm; (4) the extent of the defendant's violation; (5) whether the defendant had a legitimate reason for his actions; (6) whether an award of damages would serve a legitimate purpose; and (7) whether the de-

fendant was also subject to another judgment based on the same conduct. *DirecTV, Inc. v. Huynh*, 318 F. Supp.2d 1122, 1132 (M.D. Ala. 2004) (citations omitted). Some courts applying these criteria have found damages inappropriate, favoring instead assessment of damages under 47 U.S.C. § 605(a), which provides greater judicial discretion to set a particular damages amount. *See DirecTV, Inc. v. Cain*, No. 03-CV-5362, 2005 U.S. Dist. LEXIS 7404, *5 (D.N.J. April 20, 2005); *DirecTV, Inc. v. Carpenter*, No. 03-5247, 2005 U.S. Dist. LEXIS 5124, *11-12 (N.D. Cal. March 11, 2005).

This Court takes a different view. The Wiretap Act essentially sets a statutory floor for damages at $10,000. However, the statute also makes the decision of whether or not to award damages subject to the court's discretion. While it may be appealing to dismiss this scheme as an anomaly, to do so would be to be to dismiss the fact that Congress affirmatively amended the statute to create it. *See Brown*, 371 F.3d at 817 (discussing how the 1986 amendments to the Act changed the text of damages provision from "shall" to "may."). "When Congress alters the wording of a statute, [the court] presume[s] that Congress intended a change in the law." *Hiivala v. Wood*, 195 F.3d 1098, 1103 (9th Cir. 1999).

In requiring that courts award either award no damages or a particular amount of damages no less than $10,000, Congress may have anticipated that courts would be placed in the position of having to set damages without any satisfactory guidance rooted in the defendant's conduct or the harm to the plaintiff.[9]

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[9] Even if defendant had appeared in this action, plaintiff would still face an uphill battle proving the amount and duration of interception. *See Gross v. Taylor*, No. 96-6514, 1997 U.S.

In response Congress provided a specific rule for damages calculation as well as a minimum damages amount of $10,000. The amount chosen reflects Congress's view of what level of damages provides a sufficient deterrent and adequately compensates the plaintiff.[10] By adding to this a simple yes or no vote by the court, Congress has instructed courts to make a determination regarding the sufficiency of the case against defendant and the seriousness of the alleged conduct. Where the Court determines that such a threshold is met, it must award the particular amount determined by Congress, rather than engaging in the guesswork involved in gauging the defendant's culpability and the harm to the plaintiff based on minimal evidence and weak inferences.

Here, the Court faces significant uncertainty with respect to the seriousness of the interception perpetrated by defendant. However, the Court deems important the significant evidence DirecTV has produced of defendant's liability. Without having any access to defendant at all, plaintiff was able to determine that he terminated his DirecTV subscrip-

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Dist. LEXIS 11657, *15 (E.D. Penn. 1997) (discussing "peculiar difficulties plaintiffs face in presenting evidence in wiretap claims"). In addition, because the statute provides for criminal and civil penalties, one might expect that in many civil Wiretap Act cases the defendant would invoke the Fifth Amendment privilege against self incrimination.

[10] While it may be argued that Congress spoke more directly regarding damages in satellite piracy cases in enacting 47 U.S.C. § 605(a) and its associated damages provisions, the Court is bound by the determination of the Ninth Circuit that Congress intended such conduct to also fall within the scope of section 2520. The Court must therefore ascribe to the Wiretap Act's statutory scheme a meaning that gives effect to the Ninth Circuit's interpretation.

tion just weeks before his purchase of the pirate access device and that he visited internet bulletin boards discussing techniques for pirating DirecTV. The record also reflects that defendant purchased an unlooper from White Viper. The Court finds this latter piece of evidence, by itself, creates a strong presumption that defendant illegally intercepted DirecTV's signal.

The unlooper is so unique to DirecTV piracy that legitimate use of the device may only occur in the context of DirecTV's own investigations of piracy. Because unloopers are so uniquely engineered for DirecTV piracy, the fears expressed by EFF that a large damage award risks punishing ownership of a legal technology are alleviated. While there may be some theoretical legitimate uses of this technology, defendant's default means the Court need not entertain such theories.

Plaintiff has also made a considerable showing regarding the losses it has suffered due to pirate activities. DirecTV loses millions of dollars every year because of satellite piracy, and is forced to spend millions more in attempts to deter it. While the specific amount of loss may be impossible to determine, the Court is satisfied that it represents a serious threat to the satellite television industry—a threat Congress sought to combat, in part, through the Wiretap Act.

Because plaintiff has presented strong evidence of defendant's liability, while having also made a strong showing of harm, the Court finds that the threshold showing contemplated by section 2520(c)(2) has been established. Accordingly, the Court awards DirecTV $10,000 in statutory damages.

3. Attorneys' Fees

The Wiretap Act allows the Court to award plaintiff reasonable attorneys' fees and other litigation costs. 18 U.S.C. § 2520(b)(3). DirecTV requested $2,383.40 in attorneys' fees and costs in the present action in its original motion for default judgment. Plaintiff likely incurred additional fees and costs in making its presentation at the evidentiary hearing. However, because of the large number of DirecTV piracy lawsuits both before this Court and nationwide, the Court expects that the actual fees and costs per case would not be substantial. Moreover, in the interest of fairness, fees and costs incurred by DirecTV during prosecution of the present action should not all fall on the defendant in this action, but rather should be spread over all DirecTV piracy defendants. Therefore, the Court shall award attorneys' fees and costs, but shall reduce the amount requested to $2,000. *See Shaver v. Shaver*, 799 F. Supp. 576, 581 (E.D.N.C.) (award of damages under Wiretap Act is subject to court's discretion).

C. 47 U.S.C. § 605(e)(4)

Because the complaint requests $20,000 in damages, the Court must also consider whether damages are appropriate under the other statutes under which relief is sought.

1. Liability

Section 605(e)(4) provides liability for:

> any person who manufactures, assembles, modifies, imports, exports, sells, or distributes any electronic mechanical, or other device or equipment, knowing or having reason to know that the device or equipment is primarily of assistance in

> the unauthorized decryption of satellite cable programming, or direct-to-home satellite services, or is intended for any other activity prohibited by subsection (a) of this section . . .

47 U.S.C. § 605(e)(4). According to DirecTV, this statute applies to defendant's conduct because use of the pirate access device entails programming or reprogramming a smart card or an emulator—conduct which plaintiff contends constitutes "modific[ation]" under the statute.[11] Several courts have rejected the notion that such allegations make out a claim under section 605(e)(4), finding instead that the provision only targets commercial activities such as manufacturing and distribution, and does not encompass the mere purchase of piracy equipment for personal use. *See Carpenter*, 2005 U.S. Dist. LEXIS 5124, *17 (citing cases).

The plain text of section 605 demonstrates that Congress sought to treat differently different participants in the market for piracy products. In contrast to section 605(e)(4), which focuses on manufacturers, importers and distributors of piracy equipment, section 605(a) targets individuals who illegally receive or assist in receiving a satellite signal. The statute does

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[11] DirecTV also argues that the insertion of a modified access card into a DirecTV receiver box is also conduct in violation of the statute because in constitutes "assembl[ing]." This reaches too far because it would render all use of piracy equipment as a violation of 605(e)(4). If insertion of a card into a receiver constitutes assembling, then so too must plugging the receiver into the wall, or attaching a cable from the receiver to a television, or perhaps even turning on the device. To so rule would be to totally destroy the distinction between 605(e)(4) and 605(a). Because the statute imposes two totally different damage regimes for those two statutes, the Court declines to do so. *See* 47 U.S.C. §605(e)(3)(C)(i)(II).

not place these two classes of conduct on the same footing. Instead, its damages provisions make available much larger civil remedies for violations of section 605(e)(4) than for 605(a). *See* 47 U.S.C. §605(e)(3)(C)(i)(II) (setting statutory damages range for violations of subsection (a) at $1,000-$10,000 and for subsection (e)(4) at $10,000-$100,000). Because all DirecTV pirates must reprogram a smart card or emulator in order to illegally receive DirecTV's signal, classifying such conduct under section 605(e)(4) would nullify the distinction built into the statute. Therefore, the Court finds that only section 605(a) applies to the conduct alleged in the complaint.

D. 47 U.S.C. § 605(a)

The Court need not reach the DirecTV's claims under this statute because plaintiff has requested that the Court award damages under section 605(a) only if damages are not awarded under the other statutes. However, even if DirecTV had requested damages under this provision, the Court would still find such double recovery inappropriate.

CONCLUSION

For the reasons stated above, the Court hereby enters default judgment in favor of plaintiff and against defendant. The Court hereby ORDERS that defendant Hoa Huynh pay to plaintiff DirecTV, Inc. damages in the amount of $10,000 and attorneys' fees and costs in the amount of $2,000.

IT IS SO ORDERED.

Dated: May 31, 2005

/s/
Charles R. Breyer
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
CALIFORNIA

No. 04-3454 SBA

DIRECTV, INC.

Plaintiff,

v.

CODY OLIVER,

Defendant.

ORDER

This matter comes before the Court on Plaintiff DIRECTV, Inc.'s ('DIRECTV') Motion for Default Judgment and damages against Defendant Cody Oliver ('Defendant') and request for Attorneys' Fees and Costs. Having read and considered the arguments presented, the Court finds this matter appropriate for disposition without a hearing. The Court HEREBY GRANTS Plaintiff's Motion for Default Judgment and awards Plaintiff damages of $20,000. Furthermore, the Court GRANTS Plaintiff's request for costs and orders Plaintiff to provide supplemental briefing on its request for attorneys' fees.

BACKGROUND

On August 20, 2004, Plaintiff DIRECTV filed a Complaint alleging that Defendant Oliver purchased and used one or more Pirate Access Devices which allowed him to view DIRECTV's television programming without authorization by or payment to DIRECTV. On September 26, 2004 Defendant was

properly served with a copy of the Summons and DIRECTV's Complaint, and has since failed to appear or otherwise defend in this action. (Declaration of Sandeep J. Shah in Support of Motion for Default Judgment ('Shah Decl.,' ¶ 3.) On December 14, 2004, the Clerk of the Court entered default against Defendant. [Docket No. 11.] The instant Amended Motion for Default Judgment was filed on February 17, 2005 and served on Defendant.

LEGAL STANDARD

Under Federal Rule of Civil Procedure 55(b), judgment by default may be entered by the court; but no judgment by default shall be entered against an infant or incompetent person unless represented in the action by a general guardian. No party in default is entitled to notice under Rule 55 unless he has 'appeared' in the action. *See Wilson v. Moore & Assocs., Inc.*, 564 F.2d 366, 368 (9th Cir. 1977). If the party against whom default is sought has "appeared" in the action, the party must be served with written notice of the application for judgment at least three days prior to the hearing. "Normally, an appearance in an action involves some presentation or submission to the court. But because judgments by default are disfavored, a court usually will try to find that there has been an appearance by defendant." *Direct Mail Specialists, Inc. v. Eclat Computerized Tech., Inc.*, 840 F.2d 685, 689 (9th Cir. 1988) (internal quotation marks and citations omitted). Thus, a defendant who has not formally appeared, for example by filing a responsive pleading, may be deemed to have appeared for purposes of Fed. R. Civ. P. 55 if the defendant clearly manifested an intention to defend the action. *Id.*; *see Wilson v. Moore & Assocs., Inc.*, 564 F.2d 366, 369 (9th Cir. 1977) ('The

appearance need not necessarily be a formal one, i.e., one involving a submission or presentation to the court. In limited situations, informal contacts between the parties have sufficed when the party in default has thereby demonstrated a clear purpose to defend the suit'). The court may conduct such hearing as it deems necessary and proper to enable it to enter judgment or to determine the amount of damages.

The decision of whether to grant or deny a request for default judgment lies within the sound discretion of the district court. *Aldabe v. Aldabe*, 616 F.2d 1089, 1092 (9th Cir. 1980) (affirming denial of motion for default judgment and *sua sponte* dismissal of plaintiff's claims). In exercising its discretion, the district court is guided by consideration of the following factors:

> (1) the possibility of prejudice to the plaintiff; (2) the merits of plaintiff's substantive claim; (3) the sufficiency of the complaint; (4) the sum of money at stake in the action; (5) the possibility of a dispute concerning material facts; (6) whether the default was due to excusable neglect; and (7) the strong policy underlying the Federal Rules of Civil Procedure favoring decisions on the merits.

Eitel v. McCool, 782 F.2d 1470, 1471–72 (9th Cir. 1986) (affirming denial of motion for default judgment where district court had serious reservations concerning the substantive merit of the claims, a large amount of damages were at issue, and there was a factual dispute with regard to the matters alleged in the pleadings).

A formal hearing on a default judgment motion is not required. *See United States v. DeFrantz*, 708 F.2d 310, 312–13 (7th Cir. 1983) (finding that district

court did not err in refusing to hold a hearing where the motion for default judgment indicated the amount of damages sought). Moreover, the Court may adjudicate a motion for default judgment based on the affidavits submitted by the parties. *See e.g., Transportes Aereos De Angola v. Jet Traders Inv. Corp.*, 624 F. Supp. 264 (D. Del. 1985). 'The general rule of law is that upon default the factual allegations of the complaint, except those relating to the amount [] of damages, will be taken as true.' *TeleVideo Systems, Inc. v. Heidenthal*, 826 F.2d 915, 917-918 (9th Cir. 1987) (citing *Geddes v. United Financial Group*, 559 F.2d 557, 560 (9th Cir. 1977)).

DISCUSSION

A. Procedural Requirements

In the instant case, Plaintiff has satisfied the procedural requirements for default judgment pursuant to Fed. R. Civ. P. 55(a). Pursuant to Fed. R. Civ. P. 55(a), the Court Clerk properly entered default against Defendant for failure to respond to the Complaint. ([Docket No. 11]; *see* also Shah Decl., ¶ 4.) Defendant is neither an infant nor an incompetent person. (*Id.* at ¶ 8.) Defendant is not on active military duty. (*Id.*, ¶ 8 & Exh. D.) Defendant has been served with Plaintiff's Amended Motion for Default Judgment.

B. Allegations of the Complaint

Plaintiff's first claim for relief alleges that Defendant received and/or assisted others in receiving unauthorized satellite signals in violation of 47 U.S.C. § 605(a); Plaintiff's second claim asserts that Defendant received unauthorized electronic communications by using the Pirate Access Devices to decrypt

and view DIRECTV's satellite transmissions in violation of 18 U.S.C. § 2520(a); Plaintiff's third claim alleges that Defendant knowingly manufactured, assembled, sold, distributed, or modified an electronic device, knowing, or having reason to know, that the device or equipment is used primarily in the assistance of the unauthorized decryption of satellite programing in violation of 47 U.S.C. § 605(e)(4); Plaintiff's fourth claim seeks damages for conversion to his own use and benefit property belonging to DIRECTV.

(Compl., ¶¶ 13-31.)

Plaintiff seeks default judgment against Defendant in the amount of $20,000. Plaintiff seeks this relief for violation of 47 U.S.C. § 605(e)(4), or alternatively, for violation of 18 U.S.C. § 2520(a), or, alternatively, for violation of 47 U.S.C. § 605(a).

1. 47 U.S.C. § 605(e)(4)

47 U.S.C. § 605(e)(4) is meant to target upstream manufacturers and/or distributors of illegal pirating devices. *See DirecTV Inc. v. Albright*, 2003 U.S. Dist. LEXIS 23811, *7 (E.D. Pa. 2003); *DirecTV, Inc. v. Borich*, 2004 U.S. Dist. LEXIS 18899, at *8-9 (S.D.W.Va. 2004); *see* also *DirecTV, Inc. v. McDougall*, 2004 U.S. Dist. LEXIS 23013, at *9 (W.D.Tex. 2004) (where the court found that DirecTV alleged a proper violation of § 605(e)(4) because of the alleged sale or distribution of pirate access devices). Section 47 U.S.C. § 605(e)(4) states:

> Any person who manufactures, assembles, modifies, imports, exports, sells, or distributes any electronic, mechanical, or other device or equipment, knowing or having reason to know that the device or equipment is primarily of

> assistance in the unauthorized decryption of satellite cable programming, or direct-to-home satellite services, or is intended for any other activity prohibited by subsection (a), shall be fined not more than $ 500,000 for each violation, or imprisoned for not more than 5 years for each violation, or both. For purposes of all penalties and remedies established for violations of this paragraph, the prohibited activity established herein as it applies to each such device shall be deemed a separate violation.

47 U.S.C. § 605(e)(4). "Three elements must be shown to establish that defendant violated § 605(e)(4): (1) defendant distributed or sold equipment, (2) the equipment was primarily of assistance in decrypting satellite signals, such as DirecTV's, without permission, and (3) defendant knew or had reason to know that the equipment primarily aided the unauthorized use of such signals." *Directv Inc. v. Little*, 2004 U.S. Dist. LEXIS 16350, *17 (N.D. Cal., 2004) (citing *International Cablevision, Inc. v. Sykes*, 75 F.3d 123, 133 (9th Cir. 1996); *Allarcom Pay Television, Ltd. v. General Instrument Corp.*, 69 F.3d 381,385-386 (9th Cir. 1995)).

Plaintiff asserts that on or about September 13, 2001, Defendant purchased a "Pirate Access Device, called a 'Cube,' consisting of a multipurpose device functioning as a printed circuit board device called an 'unlooper,' and a printed circuit board device called a 'loader'" from a company called DSS Pro. (Compl., ¶ 15(a).) Plaintiff asserts that on or about October 13, 2001, Defendant purchased a "Pirate Access Device called a 'SAT-ATMEL Microchip'" from a company called Easybuy. (*Id.*, ¶ 15(b).) Plaintiff asserts a

violation of 47 U.S.C. § 605(e)(4) based upon these and the following allegations:

> Upon information and belief, Defendant actively programmed and reprogrammed DIRECTV Access Cards and designed electronic systems for use in surreptitiously obtaining DIRECTV programming. Further, by removing and inserting Pirate Access Devices and/or inserting illegally programmed Access Cards into valid DIRECTV Receivers, Defendant engaged in the unlawful assembly and/or modification of devices primarily of assistance in the unauthorized decryption of satellite programming.

(*Id.*, ¶ 22.) The Court takes Plaintiff's factual allegations as true. *Geddes*, 559 F.2d at 560. However, "[t]here must be a sufficient basis in the pleadings for the judgment entered. . . . [t]he defendant is not held to admit facts that are not well-pleaded or to admit conclusions of law." *Nishimatsu Const. Co., Ltd. v. Houston Nat. Bank*, 515 F.2d 1200, 1206 (5th Cir. 1975).

Plaintiff alleges that the Pirate Access Devices purchased by Defendant were: (1) a "Cube" and (2) a "SAT-ATMEL Microchip." (Compl., ¶ 15.) A "Cube" consists of a "loader" and can be modified to serve as an "unlooper." (*See Id.* and Declaration of Jaime Sichler ("Sichler Decl.") ¶ 5.) A "loader" is designed to load code to the memory region of a DIRECTV access card in order to allow a person to gain access to DIRECTV programming. (Sichler Decl., ¶ 5.) It can be modified to also function as an "unlooper," which is used to restore functionality to illegally modified DIRECTV access cards. (*Id.*) A SAT-ATMEL Microchip is used to "modify an unlooper device by attaching the Atmel chip to it, connect the unlooper

device to a personal computer, and then insert a 'looped pirated DIRECTV access card into the unlooper device to 'unloop' it" and allow the access card to be used. (*Id.*, ¶ 6.) Plaintiff asserts that a § 605(e)(4) violation occurred "by inserting Pirate Access Devices and/or inserting illegally programmed Access Cards" into valid DIRECTV Receivers. (Compl. at ¶ 25.) Plaintiff apparently asserts that this "modification" of "Access Cards" entitles it to default judgment under § 605(e)(4) even if he did not engage in the distribution or sale of these devices. (*See Id.*)

However, as stated in one of the cases *Plaintiff* cites in support of its position, courts that have addressed whether the purchase and use of pirate access devices constitutes a violation of § 605(e)(4) in the context of a motion for default judgment have found that it does not:

> Courts that have addressed the issue have concluded that mere purchasing and use of pirate access devices does not constitute a violation of section 605(e)(4). *See DIRECTV, Inc. v. Albright*, No. 03-4603, 2003 WL 22956416 at * 7 (E.D.Pa. Dec. 9, 2003) (section 605(e)(4) "targets upstream manufacturers and distributors, not the ultimate consumer of pirating devices."); *See* also *DIRECTV, Inc. v. Borich*, No. Civ. A. 1:03-2146, 2004 WL 2359414 (S.D.W.Va. Sept. 17, 2004) ("the court does not find that the act of 'removing and inserting Pirate Access Devices and/or inserting illegally programmed Access Cards into valid DIRECTV Receivers' is the type of assembly or modification prohibited by the statute. . . . Borich's act of installing and activating the pirate access device does not convert him into the type of manufacturer or

distributor of these devices contemplated by Section 605(e)(4)").

DirecTV, Inc. v. McDougall, 2004 U.S. Dist. LEXIS 23013, at *9. In *McDougall*, the defendant had purchased eight Pirate Access Devices and Plaintiff had specifically alleged that Defendant had engaged in an enterprise to sell and/or distribute the Devices. *Id.* at *3. Here, there are no factual allegations asserting that Defendant sold or distributed the Pirate Access Devices.[1] In addition, Plaintiff does not allege that Defendant purchased the same two Pirate Access Devices, which might suggest that one was for sale; instead, Plaintiff alleges that Defendant purchased two apparently complementary devices, suggesting that they were for use by one person. Because Plaintiff has not alleged that Defendant was involved in the sale or distribution of the Pirate Access Devices, the Court finds that Plaintiff has failed to sufficiently demonstrate the merits of this claim. *Eitel*, 782 F.2d at 1471–72. The Court therefore declines to grant default judgment pursuant to 47 U.S.C. § 605(e)(4).

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[1] Plaintiff does assert, in conclusory fashion, that "[u]pon information and belief, Defendant knowingly manufactured, assembled, sold, distributed, or modified an electronic, mechanical, or other device or equipment knowing, or having reason to know, that the device or equipment is used primarily in the assistance of the unauthorized decryption of satellite programming, or direct-to-home services, or is intended for any other prohibited activity." (Compl. at ¶ 25.) However, merely mimicking the language of the statute is not a factual allegation. (Compare 47 U.S.C. § 605(e)(4).)

2. 18 U.S.C. § 2520(a)

In the alternative, Defendant seeks default judgment under 18 U.S.C. § 2520(a), which states:

> Except as provided in section 2511(2)(a)(ii) [18 USCS § 2511(2)(a)(ii)], any person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used in violation of this chapter [18 USCS §§ 2510 et seq.] may in a civil action recover from the person or entity, other than the United States, which engaged in that violation such relief as may be appropriate.

The Ninth Circuit has held that the plain language of the Electronic Communications Privacy Act (ECPA) 18 U.S.C. §§ 2510-2521, applies to the piracy of satellite television. *United States v. Lande*, 968 F.2d 907, 908 (9th Cir. 1992). Here, Plaintiff has alleged that Defendant purchased the Pirate Access Devices from companies called DSS Pro and Easybuy. (Compl. at ¶¶ 3-6.) Plaintiff obtained records from both companies, which indicated that Defendant had purchased the Pirate Access Devices. (*Id.*)[2] Plaintiff alleges that Defendant used these Pirate Access Devices to decrypt and view DIRECTV's satellite television transmissions, and that this activity has harmed DIRECTV by depriving it of subscription and pay-per-view revenues. (*Id.* at ¶ 18.) Moreover, Plaintiff has alleged that it is a "person" pursuant to

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[2] Plaintiff also asserts that Defendant purchased DIRECTV satellite equipment on May 16, 2000, demonstrating that, in conjunction with the Pirate Access Devices, Defendant had the capability of accessing all of Plaintiff's programming. (Sichler Decl., ¶ 8.)

the statute. (*Id.*)[3] Accordingly, the Court finds that default judgment is appropriate under § 2520(a), and that Plaintiff is entitled to damages according to proof.

Damages under 18 U.S.C. § 2520(a) are governed by 18 U.S.C. § 2520(c)(2), which provides that the Court may assess damages of whichever is the greater of:

> (A) the sum of the actual damages suffered by the plaintiff and any profits made by the violator as a result of the violation; or
>
> (B) statutory damages of whichever is the greater of $ 100 a day for each day of violation or $10,000

The Court has discretion to award damages under § 2520(c)(2). *Dorris v. Absher*, 179 F.3d 420, 428- 430 (6th Cir. 1999). "Factors that may be considered include whether the plaintiff suffered financial harm, the extent to which a violation occurred and unlawfully intercepted signals were disclosed, whether the defendant had a legitimate reason for his or her actions, whether the defendant profited from his or her acts, and whether an award of damages would serve a legitimate purpose." *Directv, Inc. v. Guzzi*, 308 F. Supp. 2d 788, 790 (D. Mich., 2004).

First, in assessing § 2520(c)(2) damages, "the court should determine the amount of actual damages to the plaintiff plus the profits derived by the violator, if

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[3] Pursuant to 18 U.S.C. § 2510(6): "'person' means any employee, or agent of the United States or any State or political subdivision thereof, and any individual, partnership, association, joint stock company, trust, or corporation."

any." *Dorris*, 179 F.3d at 430. Plaintiff has calculated the value of programming purchased by the typical DIRECTV high-end legitimate customer (top 10% of subscribers to DIRECTV for the year 2003) at $229.08 per month, or $7.53 per day. (Sichler Decl., ¶¶ 19-20.) Plaintiff then asserts that Defendant, who purchased two Pirate Access Devices to illegally obtain DIRECTV programming, would likely use at least as much as a typical high end user because he would have paid a substantial sum for the devices and would be able to access all of DIRECTV's proprietary programming, including pay-per-view movies, sporting events, and adult programming. (*Id.* ¶ 19.) Thus, pursuant to the allegations in the Complaint, now taken as true, Defendant purchased the first Pirate Access Device on September 13, 2001 and used it until April 30, 2004 (960 days).[4] The damages suffered by Plaintiff amount to a daily charge of $7.53 multiplied by 960 days, for a damage total of $7,228.80. (Motion, 17.) Plaintiff also asserts that it expends substantial resources investigating and preventing piracy, but provides no specific damages calculation for these activities. (Sichler Decl., ¶ 10-17.)

"The court should next ascertain the number of days that the statute was violated, and multiply by $100." *Dorris*, 179 F.3d at 430; 18 U.S.C. § 2520(c)(e)(B). Multiplying $100 by 960 would equal $96,000. "The Court should then tentatively award the plaintiff the greater of the above two amounts (actual or statutory damages) unless each is less than

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[4] Plaintiff asserts that in or about April 2004, the data stream used by DIRECTV was changed such that the Pirate Access Device used by Defendant would no longer be operational. (Motion at 9, fn. 5.)

$10,000, in which case the $10,000 award is presumed." *Dorris*, 179 F.3d at 430. DIRECTV claims $7,228.80 in actual damages, while the statutory damages of $100 per day total $96,000. However, DIRECTV limits its request for statutory damages to $20,000. (Compl. at p. 7.)[5]

"Finally, the court should exercise its discretion to determine whether the plaintiff should receive any damages at all in the case before it." *Dorris*, 179 F.3d at 430. Here, Plaintiff has demonstrated the appropriateness of an award of damages. Defendant has admitted, through default, that it intercepted DIRECTV's satellite programming and harmed DIRECTV through the loss of revenue it would otherwise have received. In addition, there is no evidence that there is any legally permissible use for the Pirate Access Devices. Thus, an award of damages would serve the purposes of compensating DIRECTV and deterring future violations. Accordingly, the Court grants DIRECTV's request for damages in the amount of $20,000.[6]

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[5] In the Complaint, Plaintiff requests statutory damages in the amount of $10,000 per Pirate Access Device, for a total award of $20,000. Because mere possession of multiple devices does not establish the commission of multiple violations of 18 U.S.C. § 2511(a), on this record Plaintiff is not entitled to $10,000 per Pirate Access Device possessed by Defendant. *See DirecTV, Inc. v. Bloniarz*, 336 F.Supp.2d 723, 727 (W.D. Mich. 2004). Nevertheless, the Court construes Plaintiff's damages request as one limiting the presumed award of $96,000, to which it is entitled under § 2520(c)(2)(B), to $20,000.

[6] Because the Court finds that Plaintiff is entitled to its requested relief pursuant to 18 U.S.C. § 2520(a), the Court does not reach Plaintiff's alternative request pursuant to 47 U.S.C. § 605(a).

C. Attorneys' Fees

DIRECTV is entitled to reasonable attorneys' fees and costs incurred in prosecuting its claims for violation of 18 U.S.C. § 2520(a). 18 U.S.C. § 2520(b)(3); Fed. R. Civ. P. 54. DIRECTV requests $2,915.50 incurred in prosecuting its claims. (Motion at 20.) The party requesting fees "bears the burden of documenting the appropriate hours expended in the litigation and must submit evidence in support of those hours worked." *Gates v. Rowland*, 39 F.3d 1439, 1449 (9th Cir. 1994).

Plaintiff has provided invoices for the amounts spent on the instant action. (Shah Decl., Exh. E.) Plaintiff asserts that $669.00 was spent prior to preparation of the instant Motion for Default Judgment. (*Id.* at ¶ 10.) The fees were incurred by Plaintiff's prior firm, Danner & Martyn ("Danner Firm"), and its present counsel, Buchalter, Nemer, Fields, & Younger ("Buchalter Firm"). (*Id.*) Plaintiff seeks $158 for work done by the Danner Firm, and $511.00 for work done by the Buchalter Firm. (*Id.* at ¶ 11.)

Defendant was originally one of five defendants brought in an action by Plaintiff, which was dismissed without prejudice for re-filing against each defendant individually ("Previous Action"). (*See Id.* at ¶ 10; July 26, 2004 Order by Judge Ware at 18 (Exh. F to Shah Decl.).)[7] Thus, the Danner Firm has divided the fees spent on the Previous Action by five, except for tasks specifically billed to Defendant

[7] The DIRECTV cases were assigned to Judge Ware for the limited purpose of determining issues regarding joinder of defendants and the showing needed to establish a prima facie case under statutory claims. (Shah Decl., Exh. F.)

Oliver's case, or tasks specifically billed to other defendants. (*Id.* at ¶ 10.) Prior to the filing of the instant motion, the Danner firm spent 6.7 total hours on the Previous Action. Of that time, 0.2 hours were billed solely to Defendant Oliver, while 1.2 hours were spent on defendants other than Oliver. (*Id.* at Exh. E.) Thus, dividing the remaining time (5.3 hours) by 5, and adding 0.2 hours, equals approximately 1.25 hours spent on Oliver's case in the Previous Action. (*Id.*) Plaintiff, however, does not provide the names of the attorneys from the Danner Firm who worked on the Previous Action, their relevant experience, or their billing rates.

The Buchalter Firm requests $511.00 for work done from August 19, 2004 to September 30, 2004. (*Id.* at ¶ 1 1 and Exh. E.) The Buchalter Firm spent 2.2 hours on, inter alia, revising the complaint, reviewing additional evidence against defendant, reviewing the ADR scheduling order, and preparing the summons and complaint for service. (*Id.* at Exh. E.) Although this hourly total is reasonable for completion of these tasks, Plaintiff has not described the relevant experience meriting the billing rates of the individuals who worked on this action. The only attorney whose experience Plaintiff provides is that of Sandeep Shah, who is a 2000 graduate of McGeorge Law School. (*Id.* at ¶ 9.) Mr. Shah states that he has been continuously practicing in commercial and business litigation since his graduation, and that his billing rate is $255.00 per hour. (*Id.*) While this is reasonable, it does not appear that Mr. Shah billed any time to this case prior to the instant motion. Instead, Kelli Osaki ($300/hour), Marci L. Knighten ($125/hour), and Kristine L. Collins ($135/hour), billed the $511 referenced above; however, their level of relevant

experience is not provided. (*Id.* at Exh. E.) Accordingly, while the overall number of hours is reasonable, Plaintiff has failed to provide evidence supporting the billing rates of these attorneys.

In addition, Plaintiff asserts that it has spent $855 in preparation of the instant motion. Mr. Shah asserts that Kristine L. Collins spent 3.5 hours at $135/hour preparing the instant motion, while Mr. Shah spent 1.5 hours reviewing and revising the motion. The time spent is reasonable, and Mr. Shah's billing rate is reasonable based on his experience. However, as stated supra, Ms. Collins' billing rate has not been justified.

Accordingly, Plaintiff is granted leave to submit evidence supporting the billing rates for the attorneys described above.[8] Plaintiff may not, however, request any additional fees for the preparation of such evidence because Plaintiff should have provided such information with its original request for fees.

CONCLUSION

For the foregoing reasons, IT IS HEREBY ORDERED THAT Plaintiff's Motion for Default Judgment is GRANTED pursuant to 18 U.S.C. § 2520(a), and Plaintiff is awarded damages of $20,000. The Court also finds that Plaintiff is entitled to costs, and Plaintiff is directed to file a Bill of Costs in compliance with the Local Rules of this Court.

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[8] Plaintiff also asserts that it expects to incur approximately $765.00 in attorneys' fees in connection with a hearing on this motion because it anticipates that the hearing will take three hours. (*Id.* at ¶ 12.) Because no hearing was held, the Court declines to award such fees.

IT IS FURTHER ORDERED THAT Plaintiff must file, within 15 days of this Order, supplemental briefing providing evidence in support of the billing rates for the attorneys described above.

IT IS SO ORDERED.

Dated: 5-12-05

/s/ Saundra Brown Armstrong
SAUNDRA BROWN ARMSTRONG
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed January 03, 2008]

No.05-16361
D.C. No CV-04-03496-CRB
Northern District Court of
California, San Francisco

DIRECTV, INC.,
Plaintiff - Appellant,
v.
HOA HUYNH,
Defendant - Appellee.

No.05-16362
D.C. No. CV-04-03454-SBA
Northern District of California, Oakland

DIRECTV, INC.,
Plaintiff - Appellant,
v.
CODY OLIVER,
Defendant - Appellee.

ORDER

Before: B. FLETCHER, SILER,[1] and HAWKINS, Circuit Judges.

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[1] The Honorable Eugene E. Siler, Jr., Senior United States Circuit Judge for the Sixth Circuit, sitting by designation.

Judge Hawkins has voted to deny the petition for rehearing en banc and Judge B. Fletcher so recommends. Judge Siler recommends rehearing for the reasons stated in his dissent.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing en banc is denied.

RELEVANT STATUTE

UNITED STATES CODE ANNOTATED
Effective: February 8, 1996

Title 47. Telegraphs, Telephones, and Radiotelegraphs
Chapter 5. Wire or Radio Communication
Subchapter VI. Miscellaneous Provisions

§ 605. Unauthorized publication or use of communications

(a) Practices prohibited

Except as authorized by chapter 119, Title 18, no person receiving, assisting in receiving, transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, (1) to any person other than the addressee, his agent, or attorney, (2) to a person employed or authorized to forward such communication to its destination, (3) to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, (4) to the master of a ship under whom he is serving, (5) in response to a subpena issued by a court of competent jurisdiction, or (6) on demand of other lawful authority. No person not being authorized by the sender shall intercept any radio communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person. No person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by radio and use such communication (or any information therein contained) for his own

benefit or for the benefit of another not entitled thereto. No person having received any intercepted radio communication or having become acquainted with the contents, substance, purport, effect, or meaning of such communication (or any part thereof) knowing that such communication was intercepted, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of such communication (or any part thereof) or use such communication (or any information therein contained) for his own benefit or for the benefit of another not entitled thereto. This section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication which is transmitted by any station for the use of the general public, which relates to ships, aircraft, vehicles, or persons in distress, or which is transmitted by an amateur radio station operator or by a citizens band radio operator.

(b) Exceptions

The provisions of subsection (a) of this section shall not apply to the interception or receipt by any individual, or the assisting (including the manufacture or sale) of such interception or receipt, of any satellite cable programming for private viewing if—

(1) the programming involved is not encrypted; and

(2)(A) a marketing system is not established under which—

(i) an agent or agents have been lawfully designated for the purpose of authorizing private viewing by individuals, and

(ii) such authorization is available to the individual involved from the appropriate agent or agents; or

(B) a marketing system described in subparagraph (A) is established and the individuals receiving such programming has obtained authorization for private viewing under that system.

(c) Scrambling of Public Broadcasting Service programming

No person shall encrypt or continue to encrypt satellite delivered programs included in the National Program Service of the Public Broadcasting Service and intended for public viewing by retransmission by television broadcast stations; except that as long as at least one unencrypted satellite transmission of any program subject to this subsection is provided, this subsection shall not prohibit additional encrypted satellite transmissions of the same program.

(d) Definitions

For purposes of this section—

(1) the term "satellite cable programming" means video programming which is transmitted via satellite and which is primarily intended for the direct receipt by cable operators for their retransmission to cable subscribers;

(2) the term "agent", with respect to any person, includes an employee of such person;

(3) the term "encrypt", when used with respect to satellite cable programming, means to transmit such programming in a form whereby the aural and visual characteristics (or both) are modified or altered for the purpose of preventing the unauthorized receipt of such programming by persons without

authorized equipment which is designed to eliminate the effects of such modification or alteration;

(4) the term "private viewing" means the viewing for private use in an individual's dwelling unit by means of equipment, owned or operated by such individual, capable of receiving satellite cable programming directly from a satellite;

(5) the term "private financial gain" shall not include the gain resulting to any individual for the private use in such individual's dwelling unit of any programming for which the individual has not obtained authorization for that use; and

(6) the term "any person aggrieved" shall include any person with proprietary rights in the intercepted communication by wire or radio, including wholesale or retail distributors of satellite cable programming, and, in the case of a violation of paragraph (4) of subsection (e) of this section, shall also include any person engaged in the lawful manufacture, distribution, or sale of equipment necessary to authorize or receive satellite cable programming.

(e) Penalties; civil actions; remedies; attorney's fees and costs; computation of damages; regulation by State and local authorities

(1) Any person who willfully violates subsection (a) of this section shall be fined not more than $2,000 or imprisoned for not more than 6 months, or both.

(2) Any person who violates subsection (a) of this section willfully and for purposes of direct or indirect commercial advantage or private financial gain shall be fined not more than $50,000 or imprisoned for not more than 2 years, or both, for the first such conviction and shall be fined not more than $100,000 or

imprisoned for not more than 5 years, or both, for any subsequent conviction.

(3)(A) Any person aggrieved by any violation of subsection (a) of this section or paragraph (4) of this subsection may bring a civil action in a United States district court or in any other court of competent jurisdiction.

(B) The court—

(i) may grant temporary and final injunctions on such terms as it may deem reasonable to prevent or restrain violations of subsection (a) of this section;

(ii) may award damages as described in subparagraph (C); and

(iii) shall direct the recovery of full costs, including awarding reasonable attorneys' fees to an aggrieved party who prevails.

(C)(i) Damages awarded by any court under this section shall be computed, at the election of the aggrieved party, in accordance with either of the following subclauses;

(I) the party aggrieved may recover the actual damages suffered by him as a result of the violation and any profits of the violator that are attributable to the violation which are not taken into account in computing the actual damages; in determining the violator's profits, the party aggrieved shall be required to prove only the violator's gross revenue, and the violator shall be required to prove his deductible expenses and the elements of profit attributable to factors other than the violation; or

(II) the party aggrieved may recover an award of statutory damages for each violation of subsection (a) of this section involved in the action in

a sum of not less than $1,000 or more than $10,000, as the court considers just, and for each violation of paragraph (4) of this subsection involved in the action an aggrieved party may recover statutory damages in a sum not less than $10,000, or more than $100,000, as the court considers just.

(ii) In any case in which the court finds that the violation was committed willfully and for purposes of direct or indirect commercial advantage or private financial gain, the court in its discretion may increase the award of damages, whether actual or statutory, by an amount of not more than $100,000 for each violation of subsection (a) of this section.

(iii) In any case where the court finds that the violator was not aware and had no reason to believe that his acts constituted a violation of this section, the court in its discretion may reduce the award of damages to a sum of not less than $250.

(4) Any person who manufactures, assembles, modifies, imports, exports, sells, or distributes any electronic, mechanical, or other device or equipment, knowing or having reason to know that the device or equipment is primarily of assistance in the unauthorized decryption of satellite cable programming, or direct-to-home satellite services, or is intended for any other activity prohibited by subsection (a) of this section, shall be fined not more than $500,000 for each violation, or imprisoned for not more than 5 years for each violation, or both. For purposes of all penalties and remedies established for violations of this paragraph, the prohibited activity established herein as it applies to each such device shall be deemed a separate violation.

(5) The penalties under this subsection shall be in addition to those prescribed under any other provision of this subchapter.

(6) Nothing in this subsection shall prevent any State, or political subdivision thereof, from enacting or enforcing any laws with respect to the importation, sale, manufacture, or distribution of equipment by any person with the intent of its use to assist in the interception or receipt of radio communications prohibited by subsection (a) of this section.

(f) Rights, obligations, and liabilities under other laws unaffected

Nothing in this section shall affect any right, obligation, or liability under Title 17, any rule, regulation, or order thereunder, or any other applicable Federal, State, or local law.

(g) Universal encryption standard

The Commission shall initiate an inquiry concerning the need for a universal encryption standard that permits decryption of satellite cable programming intended for private viewing. In conducting such inquiry, the Commission shall take into account—

(1) consumer costs and benefits of any such standard, including consumer investment in equipment in operation;

(2) incorporation of technological enhancements, including advanced television formats;

(3) whether any such standard would effectively prevent present and future unauthorized decryption of satellite cable programming;

(4) the costs and benefits of any such standard on other authorized users of encrypted satellite cable

programming, including cable systems and satellite master antenna television systems;

(5) the effect of any such standard on competition in the manufacture of decryption equipment; and

(6) the impact of the time delay associated with the Commission procedures necessary for establishment of such standards.

(h) Rulemaking for encryption standard

If the Commission finds, based on the information gathered from the inquiry required by subsection (g) of this section, that a universal encryption standard is necessary and in the public interest, the Commission shall initiate a rulemaking to establish such a standard.

CREDIT(S)

(June 19, 1934, c. 652, Title VII, § 705, formerly Title VI, § 605, 48 Stat. 1103; June 19, 1968, Pub. L. 90-351, Title III, § 803, 82 Stat. 223; Sept. 13, 1982, Pub. L. 97-259, Title I, § 126, 96 Stat. 1099; renumbered and amended Oct. 30, 1984, Pub. L. 98-549, §§ 5(a), 6(a), 98 Stat. 2802, 2804; Nov. 7, 1988, Pub.L. 100-626, § 11, 102 Stat. 3211; Nov. 16, 1988, Pub.L. 100-667, Title II, §§ 204, 205, 102 Stat. 3958, 3959; Oct. 25, 1994, Pub.L. 103-414, Title III, §§ 303(a)(25) to (28), 304(a)(15), 108 Stat. 4295 to 4297; Feb. 8, 1996, Pub.L. 104-104, Title II, § 205(a), 110 Stat. 114.)

Current through P.L. 110-198 (excluding P.L. 110-181) approved 3-24-08